CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 142

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

vs.

PAUL W. SAMPSELL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES B. STRATTON, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

No. 10721

United States
Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co.,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MATHES & SHEPPARD
GORDON F. HAMPTON

458 S. Spring St.
Los Angeles 13, Calif.

For Appellee:

MARTIN GENDEL and
NAT ROSIN

607 James Oviatt Bldg.
617 S. Olive St.
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy

No. 39606-O'C

In the Matter of

CHARLES B. STRATTON, doing business under the fictitious firm names and styles of TEMPLE CITY BUILDING MATERIALS CO., and STRATTON CONSTRUCTION CO.,

Bankrupt.

INVOLUNTARY BANKRUPTCY PETITION AGAINST INDIVIDUAL

DEL MAR BUILDING SUPPLIES, a corporation, and

W. E. HOFFMAN, doing business under the fictitious firm name and style of Hoffman Building Materials, and

WALTER L. ZIEGLER, doing business under the fictitious firm name and style of ZIEGLER MANUFACTURING CO.,

Petitioning Creditors,

vs.

C. B. STRATTON, doing business under the fictitious firm names and styles of TEMPLE CITY BUILDING MATERIALS CO., and STRATTON CONSTRUCTION CO.,

Bankrupt.

To the Honorable J. F. T. O'Connor, Judge, United States District Court:

The petition of Del Mar Building Supplies, a corporation, W. E. Hoffman, doing business under the fictitious firm name and style of Hoffman Building Materials, and Walter L. Ziegler, doing business under the fictitious firm name and style of Ziegler Manufacturing Co., respectfully represents: [2]

I.

That petitioner, Del Mar Building Supplies, now is, and at all times herein mentioned was a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business situate in the District aforesaid. That petitioner, W. E. Hoffman, doing business under the fictitious firm name and style of Hoffman Building Materials, now is, and at all times herein mentioned was a resident of the City of El Monte, County of Los Angeles, State of California, and petitioner Walter L. Ziegler, doing business under the fictitious firm name and style of Ziegler Manufacturing Co., now is, and at all times herein mentioned was a resident of the City of Bellflower, County of Los Angeles, State of California.

II.

That C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co. and Stratton Construction Co., has, for the greater portion of the six (6) months next preceding the date of this petition, had

his principal place of business, and has resided in Temple City, County of Los Angeles, State of California, in the District aforesaid, and owes debts to the amount of One Thousand ($1,000.00) Dollars, and over; and is not a wage earner, nor a farmer, nor chiefly engaged in farming or the tillage of the soil.

III.

That your petitioners are creditors of said C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co., and have provable claims, which amount in the aggregate, in excess of securities held by them, to the sum of Five Hundred ($500.00) Dollars, and more.

IV.

The nature and amount of your petitioners' claims are [3] as follows:

The claim of Del Mar Building Supplies is for goods, wares, and merchandise, to-wit, building materials sold and delivered to said debtor at his special instance and request within two years last past, upon which there is now owing and unpaid the sum of Ninety-two and 65/100 ($92.65) Dollars;

The claim of W. E. Hoffman, doing business under the fictitious firm name and style of Hoffman Building Materials is for goods, wares, and merchandise, to-wit, building materials sold and delivered to said debtor at his special instance and request within two years last past, upon which there is now owing and unpaid the sum of Two Hundred Twenty-one and 67/100 ($221.67) Dollars;

The claim of Walter L. Ziegler, doing business under the fictitious firm name and style of Ziegler Manufacturing Co. is for goods, wares, and merchandise, to-wit, building materials sold and delivered to said debtor at his special instance and request within two years last past, upon which there is now owing and unpaid the sum of Three Hundred Thirty-four and 75/100 ($334.75) Dollars.

That all of the amounts hereinbefore mentioned remain still owing above all offsets and securities.

V.

Your petitioners further represent that said C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co. and Stratton Construction Co. now is insolvent, and that within the four (4) months next preceding the date of the filing of this Petition, the said C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co., committed an act of bankruptcy, in that on or about the 29th [4] day of October, 1941, he made a general assignment for the benefit of creditors to one, Charles R. Warfel.

Wherefore: Your petitioners pray that service of this Petition with a subpoena may be made upon the said C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co. and Stratton Construction Co. as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by the

Court to be a bankrupt, within the purview of said acts.

DEL MAR BUILDING SUPPLIES

By E. B. HALE

President

W. E. HOFFMAN

W. E. Hoffman, doing business under the fictitious firm name and style of Hoffman Building Materials

WALTER L. ZIEGLER

Walter L. Ziegler, doing business under the fictitious firm name and style of Ziegler Manufacturing Co.

ROBERT R. ASHTON

Attorney for Petitioners. [5]

United States of America
Southern District of California,
Central Division—ss.

I, E. B. Hale, the duly authorized President of Del Mar Building Supplies, a corporation organized and existing under and by virtue of the laws of the State of California, do hereby make solemn oath that the statements on behalf of Del Mar Building Supplies, a corporation, contained in the foregoing petition subscribed by me, are true.

E. B. HALE

The President of the Del Mar Building Supplies, a corporation

Subscribed and sworn to before me, this 8 day of November, 1941.

CHAS. HAAS

Notary Public in and for said County and State.

My Commission Expires Nov. 19, 1941.

United States of America,
Southern District of California,
Central Division—ss.

I, W. E. Hoffman, do hereby make solemn oath that the statements on my behalf contained in the foregoing petition, subscribed by me, are true.

W. E. HOFFMAN

Owner

Subscribed and sworn to before me, this 8th day of Nov., 1941.

[Seal] ELDRED E. WOLFORD

Notary Public in and for said County and State.

United States of America,
Southern District of California,
Central Division—ss.

I, Walter L. Ziegler, do hereby make solemn oath that the statements on my behalf contained in the foregoing petition, subscribed by me, are true.

WALTER L. ZIEGLER

Owner

Subscribed and sworn to before me, this 8 day of Nov., 1941.

[Seal] KATHERINE MacRAE
Notary Public in and for said County and State

Com. exp. 9-16-45.

[Endorsed]: Filed Nov. 10, 1941. [6]

In the District Court of the United States, Southern District of California, Central Division

No. 39,606-O'C

In the Matter of

C. B. STRATTON, dba TEMPLE CITY BUILDING MATERIALS CO., and STRATTON CONSTRUCTION CO.,

Alleged Bankrupt.

PETITION FOR ORDER REFERRING PROCEEDINGS TO A REFEREE UNDER THE PROVISIONS OF SECTION 22a OF THE BANKRUPTCY ACT

To the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, Southern District of California, Central Division:

The petitioning creditors in the above entitled alleged bankruptcy matter, through their attorney, Robert Ashton, respectfully represent to the court as follows:

I.

That an involuntary petition in bankruptcy has been filed against the above named alleged bankrupt.

II.

That the business of said bankrupt is that of building construction materials and supplies. That in the maintenance and operations of said business many problems have arisen which will require extensive examinations of the alleged bankrupt and numerous witnesses; that certain transfers of property have been made, assignments, etc., that will require further examinations under the provisions of Section 21-a of the Bankruptcy Act. It will likewise be necessary to bring certain proceedings to marshal the various assets of this estate. That your petitioners believe that the said matters can all be more expeditiously handled in the court of one of the referees of this court and your petitioners believe that under the provisions of Section 22-a of the Bankruptcy Act that the matter herein should be referred to one of the Referees of this court for further administration.

Wherefore, your petitioners pray that the proceedings herein [8] be referred generally to one of the referees of this court for such other and further administration of this estate as may be proper under

and pursuant to the provisions of Section 22-a of the Bankruptcy Act.

ROBERT ASHTON
Attorney for Petitioning Creditors.

(Duly verified by Robert Ashton.)

[Endorsed]: Filed Nov. 14, 1941. [9]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

Upon reading and filing the petition of the Petitioning Creditors, by and through their attorney, Robert Ashton, good cause appearing therefrom, and no adverse interests appearing thereat,

It Is Ordered that the above entitled matter be referred generally to the Honorable Ernest R. Utley as Referee for further administration under and pursuant to the provisions of Section 22a of the Bankruptcy Act.

Dated this 14 day of November, 1941.

J. F. T. O'CONNOR
U. S. District Judge

[Endorsed]: Filed Nov. 14, 1941. [12]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

Whereas, an involuntary petition in bankruptcy was heretofore filed in the above entitled Court in the above entitled matter, praying that Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Co., and Stratton Construction Co., be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, and an order of general reference having been made by the Judge of the above entitled court to the undersigned Referee, and it appearing that said Charles B. Stratton has filed a consent to the entry of the order of adjudication.

Now, Therefore, the said Charles B. Stratton is hereby declared and adjudged a bankrupt accordingly, and that the undersigned Referee in Bankruptcy take such further proceedings therein as are required by said Act.

Dated: November 27, 1941.

ERNEST R. UTLEY
Referee in Bankruptcy [14]

[Endorsed]: Filed Nov. 27, 1941. Ernest R. Utley, Referee, by [Illegible] Clerk.

[Endorsed]: Filed Nov. 28, 1941. R. S. Zimmerman, Clerk, by E. M. Enstrom, Jr., Deputy Clerk.

[15]

[Title of District Court and Cause.]

NUNC PRO TUNC ORDER CORRECTING DECREE

It appearing to the Court that the judgment herein entered by the Clerk in the above entitled action is not a correct memorandum of the judgment as rendered and announced by this Court, in that the judgment as rendered and announced related and had to do with the adjudication in bankruptcy of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co., and

Whereas, through inadvertence and clerical error, the said judgment of adjudication in bankruptcy referred to said bankrupt as doing business under the fictitious firm names and styles of Temple City Building Co., and Stratton Construction Co., through the inadvertent omission of the word "Materials" therein and its omission in the Schedules and Summary of the Debts and Assets and Statement of Affairs of the bankrupt:

Now, Therefore, It Is Hereby Ordered that the judgment heretofore entered by this Court in the above entitled action on the 27th day of November, 1941, be, and the same is, hereby corrected to [16] conform to the actual judgment announced and rendered by the Court by the insertion in said judgment of the word "Materials" omitted as aforesaid, and

It Is Further Ordered that said mistake be cor-

rected throughout the files herein wherever said omission occurs, and

It Is Further Ordered that the order correcting the record of said judgment be entered nunc pro tunc to appear of record as of the 27th day of November, 1941, that being the date when said judgment was *original* made and entered.

Done in Open Court This 14 Day of April, 1942.

ERNEST R. UTLEY
Referee [17]

[Endorsed]: Filed Apr. 15, 1942. R. S. Zimmerman, Clerk, by E. J. Sears, Jr., Deputy Clerk.

[Endorsed]: Filed Apr. 14, 1942. Ernest R. Utley, Referee, by Louise Rodgers. [18]

District Court of the United States for the Southern District of California, Central Division.

Bankruptcy File No. 39,606-O'C

In the Matter of

CHARLES B. STRATTON, doing business as TEMPLE CITY BUILDING MATERIALS CO.,

and as

STRATTON CONSTRUCTION CO.,

Alleged Bankrupt.

SUBPENA TO ALLEGED BANKRUPT

To Charles B. Stratton, doing business as Temple City Building Materials Co., and as Stratton Construction Co., in said district:

A petition in bankruptcy having been filed on the 10th day of Noveniber, 1941, before the District Court of the United States within and for the So. District of California, as a court of bankruptcy, praying that you may be adjudged a bankrupt under the act of Congress relating to bankruptcy.

You are hereby summoned and required to appear and plead to said petition, on or before the 21st day of November, 1941; and if you fail to do so, you may be adjudged a bankrupt by default.

Witness the Honorable J. F. T. O'Connor, judge of said court, and the seal thereof, at Los Angeles, California, this 10th day of Nov., 1941.

[Seal] R. S. ZIMMERMAN,
Clerk.
By M. M. KARCHER,
Deputy Clerk. [19]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 .. I received the within subpena

Returned unexecuted, November 28, 1941. No instructions received.

ROBERT E. CLARK,
O. S. MARSHALL
[Seal] FRED B. MANBURT,
Deputy U. S. Marshal.

[Endorsed]: Filed Dec. 4, 1941. R. S. Zimmerman, Clerk, by E. M. Enstrom, Jr., Deputy Clerk. [20]

SUMMARY OF DEBTS AND ASSETS

(From the Statements of the Debtor in Schedules A and B)

		Dollars	Cents
Schedule A....1—a	Wages	268	00
Schedule A....1—b (1)	Taxes due United States	Unknown	
Schedule A....1—b (2)	Taxes due States	"	
Schedule A....1—b (3)	Taxes due counties, districts and municipalities	"	
Schedule A....1—c (1)	Debts due any person, including the United States, having priority by laws of the United States	1,436	00
Schedule A....1—c (2)	Rent having priority	none	
Schedule A....2	Secured claims	4,742	00
Schedule A....3	Unsecured claims	52,439	01
Schedule A....4	Notes and bills which ought to be paid by other parties thereto	none	
Schedule A....5	Accommodation paper	"	
	Schedule A, total	58,885	01
Schedule B....1	Real estate	10,500	00
Schedule B....2—a	Cash on hand	93	39
Schedule B....2—b	Negotiable and non-negotiable instruments and securities	230	00
Schedule B....2—c	Stocks in trade	5,822	81
Schedule B....2—d	Household goods	1,050	00
Schedule B....2—e	Books, prints and pictures	25	00
Schedule B....2—f	Horses, cows and other animals	none	
Schedule B....2—g	Automobiles and other vehicles	25	00
Schedule B....2—h	Farming stock and implements	none	
Schedule B....2—i	Shipping and shares in vessels	none	
Schedule B....2—j	Machinery, fixtures, and tools	100	00
Schedule B....2—k	Patents, copyrights, and trademarks	none	
Schedule B....2—l	Other personal property	25	00
Schedule B....3—a	Debts due on open accounts	10,491	06
Schedule B....3—b	Policies of insurance	2,000	00
Schedule B....3—c	Unliquidated claims	none	

		Dollars Cents
Schedule B....3—d	Deposits of money in banks and elsewhere	93.39
Schedule B....4	Property in reversion, remainder, expectancy or trust	none
Schedule B....5	Property claimed as exempt....	3,375.00
Schedule B....6	Books, deeds and papers.....	none
	Schedule B, total	33,830.65

CHARLES B. STRATTON
Petitioner

[Endorsed]: Filed Dec. 23, 1941. R. S. Zimmerman, Clerk, by M. M. Karcher, Deputy Clerk. [21]

STATEMENT OF AFFAIRS

(Form No. 3)

(For Bankrupt or Debtor engaged in business)

(Instructions: Each question herein must be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet properly indentified and made a part hereof, should be used and attached. If the Bankrupt or Debtor is a partnership or a corporation, the answers should be made on behalf of such partnership, or corporation, and the statement should be verified by a member of the partnership or a duly authorized officer of the corporation.)

To The Honorable J. F. T. O'Connor, Judge of the District Court of the United States for the Southern District of California, Central Division:

The Petition of Charles Barto Stratton of 2805 Matero, City of Pasadena in the County of *County* Southern District of the State of California, and by occupation a general building contractor.

Respectfully Represents:

1. That the Petitioner ~~is now~~ (or was until the 28th day of November, 1941) engaged in the business of general contracting under the name of Stratton Construction Co., and Temple City Building Co. at the address 119 North Oak, Temple City, California.

That the Petitioner commenced such business on or about the date 1935.

That during the six years immediately preceding the filing of the original Petition herein, the Petitioner was engaged in the businesses, at the addresses and with the partners, joint adventurers or other associates, as follows:

From (date):
1935
Jan. 1939

To (date):
Nov. 10, 1941
Nov. 10, 1941

Nature of Business:
Contracting Business,
Building Materials,
Operation of Courts

Address of Business:
119 N. Oak, Temple City
119 N. Oak, Temple City
119 N. Oak, Temple City

Names of Partners or Associates:
None
"
"

2. That during the two years immediately preceding the filing of the original Petition herein, the books of account and records of the Petitioner have been kept by or under the supervision of:

From (date):
1940

To (date):
1941

Name of Bookkeeper:
Mrs. Lannie Armstrong

Address of Bookkeeper:
212 N. Cloverly, Temple City

That during the two years immediately preceding the filing of the original Petition herein, the books of account and records of the Petitioner has been audited by:

No Audit [22]

That the books of account and records of the Petitioner are now in the possession of A. S. Menick, Receiver in Bankruptcy, at the office of his attorney, George Goggin, at the address Room 817, H. W. Hellman Bldg. Los Angeles, Calif.

3. That the dates, and the names and addresses of the persons to whom the Petitioner has issued financial statements, (including those to mercantile and trade agencies) upon his business and property within the two years immediately preceding the filing of the original Petition herein, are as follows:

Date:
Jan. & July

Name of Concern:
Temple City National Bank

Nature of Business:
Temple City Building Materials, and Stratton Construction

Address:
119 N. Oak, Temple City
same

4. That the last inventory of the Petitioner's property was taken on the day of 19 by (or under the supervision of) Charles R. Warfel, address 617 S. Olive: and the said inventory was taken at market value: and the amount of said inventory was $5,822.81.

That the next prior inventory to the last inventory taken of Petitioner's property was taken on the (no previous inventories taken).

5. That the dates, sources, particulars and amounts of income received by the Petitioner during each of the two years immediately preceding the filing of the original Petition herein, other than from the operation of Petitioner's business, are as follows:

Date:

None

6. That the last filing of a U. S. Federal Income Tax Return by the Petitioner was for the year 1940 and was filed by the Petitioner at the office of U. S. Collector of Internal Revenue at Los Angeles, California.

That the last filing of a State Income Tax Return by the Petitioner was for the year 1940 and was filed by the Petitioner at the office of Franchise Tax Commissioner Income Tax Div. of the State of California at Sacramento, California.

7. That within the two years immeditely preceding the filing of the original Petition herein, the Petitioner maintained bank accounts, alone or together with any other person, and in Petitioner's own name or any other name, as follows:

Name and Address of Bank:

Temple City National Bank

Temple City National Bank

Account in Name of:

Stratton Construction Co.

Temple City Building Materials,

Names of Persons authorized to make withdrawals:

C. B. Stratton

C. B. Stratton [23]

That within the two years immediately preceding the filing of the original Petition herein, the Petitioner maintained safe deposit boxes or other depositories for Petitioner's securities, cash, or other valuables, as follows:

(Note: Give the name and address of each bank, or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and if surrendered, when surrendered, or if transferred, when transferred and the name and address of the transferee.)

Safe Deposit Box at Temple City National Bank. The only persons having access to said box were myself and my secretary and bookkeeper, Mrs. Lannie Armstrong.

8. That the only property or properties held in trust by Petitioner for any other person are as follows:

(Note: Give name and address of such person or persons and a description of the property and the amount or value thereof:

None

9. That within the six years immediate preceding the filing of the original Petition herein, proceedings under the Bankruptcy Act have been brought by or against the Petitioner as follows:
(Note: Give the location of the Bankruptcy Court, the nature of the proceeding, and whether a discharge was granted or refused, or a composition arrangement or plan was or was not confirmed.)

No prior bankruptcy proceedings ever had.

That at the time of the filing of the original Petition herein, certain property of the Petitioner was in the hands of a receiver or trustee, as follows:
(Note: If so, give the name and location of the Court, the nature of the proceeding, a brief description of the property, and the name of the receiver or trustee.)

Shortly prior to the filing of the petition herein, the bankrupt had turned over his property to Brunke & Silver, and Charles R. Warfel, as Trustees for the benefit of creditors. It is petitioner's understanding that all that property was turned over to the Receiver in Bankruptcy herein.

That within the two years immediately preceding the filing of the original Petition herein, the Petitioner made assignments of Petitioner's property for the benefit of creditors or general settlement with Petitioner's creditors, as follows:
(Note: If so, give dates, the name of the assignee or assignees, and a brief description of the terms of assignment or settlement.)

As above stated. [24]

10. That during the year immediately preceding the filing of the original Petition herein, the Petitioner made repayments of loans, as follows:

(Note: Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship. If the Bankrupt or Debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and if so, the relationship.)

11. During the year immediately preceding the filing of the original Petition herein, the Petitioner transferred or disposed of, other than in the ordinary course of business, the following assets or properties:

(Note: Give a description of the properties, the date of the transfer or disposition, to whom transferred or how disposed of and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

Pursuant to the property settlement entered into between Sadie A. Stratton and Charles B. Stratton, this petitioner transferred to said Sadie A. Stratton, his wife, the following described properties:

1. Property known as 319 South Acacia Street, San Gabriel, Calif., together with household furniture and furnishings therein located;
2. Two lots on Las Tunas Blvd. west of Oak,

Temple City, improved with a three-unit bungalow court.

Previous to these transfers all of the property in which Petitioner had an interest was held in joint tenancy with Sadie A. Stratton, and in consummation of the Property Settlement mutual releases were made to the other of those joint tenancy interests so that specific property vested in Petitioner and Sadie A. Stratton as their separate property.

12. That during the year immediately preceding the filing of the original Petition herein, the Petitioner assigned accounts receivable as follows:

Date of Assignment:
March, 1940

Name of Assignee:
Bank of America

Address of Assignee:
Ventura, California

The consideration for the above assignment was the payment in advance upon a job, to-wit: Ventura Bowling Alley, then being constructed in Ventura by Petitioner, and the assignment was for money due or to become due on that job.

13. That during the year immediately preceding the filing of the original Petition herein, the Petitioner suffered losses from fire, theft or gambling as follows:

No losses through fire, theft of gambling. [25]

(If the Bankrupt or Debtor is a partnership or corporation the following additional questions should be answered.)

14. That during the year immediately preceding the filing of the original Petition herein, personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, as follows:

Not a partnership, or a corporation.

15. (If the Bankrupt or Debtor is a Partnership) The names and addresses of the members of the partnership, comprising the Petitioner, are as follows:

Not a partnership

(If the Bankrupt or Debtor is a Corporation) The names, titles or offices held, and addresses of the officers, directors and managing executive and of each stockholder holding twenty-five (25%) percent of the issued and outstanding stock of the corporation petitioner, are as follows:

Not a corporation.

CHARLES B. STRATTON
C. B. Stratton
Bankrupt or Debtor

COURTNEY A. TEEL
Attorney for Petitioner [26]

OATH TO STATEMENT OF AFFAIRS

State of California,
County of Los Angeles—ss.

I, Charles B. Stratton, also known as Charles Barto Stratton, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

CHARLES B. STRATTON
C. B. Stratton
Bankrupt or Debtor

Subscribed and sworn to before me this 17th day of December, 1941.

KATHLEEN M. P'KER
Notary Public in and for said County and State.

[27]

[Endorsed]: Filed Dec. 23, 1941. R. S. Zimmerman, Clerk, by M. M. Karcher, Deputy Clerk. [28]

[Title of District Court and Cause.]

DISCHARGE OF BANKRUPT

At Los Angeles, in said District, on the 3rd day of March, 1942.

It appearing that Charles B. Stratton, etc. of Temple City, in the County of Los Angeles, State of California, was duly adjudged a Bankrupt on a petition filed against him on the 10th day of November, 1941; and

It further appearing that, after due notice by

mail, no objection to the discharge of said Bankrupt was filed within the time fixed by the Court (or objections to the discharge of the said Bankrupt were filed and, after due notice by mail, were heard and were not sustained);

It is ordered that the said Charles B. Stratton, etc. be, and he hereby is, discharged from all debts and claims which are made provable by said Act against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in Bankruptcy.

ERNEST R. UTLEY,
Referee in Bankruptcy.

CERTIFICATE OF TRUE COPY

United States of America,
Southern District of California,
Central Division—ss.

I, Ernest R. Utley, Referee in Bankruptcy in and for the County of Los Angeles, State of California, in and for the said district, do hereby certify that the foregoing is a true and correct copy of Discharge of Bankrupt in the above entitled matter as the same appears of record in the proceedings in said matter now on file in my office.

In Witness Whereof, I have hereunto set my hand this 3rd day of March, 1942.

ERNEST R. UTLEY,
Referee in Bankruptcy. [29]

[Endorsed]: Filed March 5, 1942. R. S. Zimmerman, Clerk, by M. M. Karcher, Deputy Clerk. [30]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Hon. J. F. T. O'Connor, Judge of the United States District Court, Southern District of California, Central Division:

I, Ernest R. Utley, Referee in Bankruptcy, to whom the above entitled matter has been referred, do hereby certify as follows:

That on the 15th day of June, 1943, after hearing of an order to show cause issued upon the verified petition of Paul W. Sampsell, Trustee, Findings of Fact, Conclusions of Law and an Order was made by the Referee herein, which said Order granted the prayer of the Trustee and he was directed not to pay any dividend on the theretofore allowed general claim of the American Surety Company of New York in the sum of $6,987.48 unless and until the claims of three general creditors, to wit, Jack Campbell in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01, had been paid in full and that the amount of the dividend otherwise payable on the claim of the American Surety Company of New York would be divided pro rata amongst the named three creditors, in the event that there was not a dividend in full, in addition to their ordinary dividend until their claims were paid in full or the dividends otherwise payable to the American Surety Company of New York, had been exhausted; that after the said three creditors were paid in full then the balance remaining of

the dividend otherwise payable to the American Surety Company of New York, if any, would be payable to said Surety Company. That thereafter and on the 25th day of June, 1943, the respondent American Surety Company of New York filed a petition for review [31] of the said Order.

Pursuant to Section 39, Subdivision 8, the Referee transmits to the Clerk the within certificate.

A short summary of the testimony as revealed by the evidence is as follows:

In 1941 the bankrupt, acting as a building contractor, obtained from the American Surety Company as surety a Laborers & Materialmen, Statutory Form of Bond for the State of California; this bond was used in connection with a construction for the General Electric Company in Ontario, California; the bond was in the amount of $33,950.00 and the company bound itself to pay in full or to be caused to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work required by the General Electric job. The bankrupt did not make all of the payments to laborers and materialmen as required prior to bankruptcy and the bonding company paid out $6,724.78 to five unpaid claimants and incurred allowable expenses chargeable under the bond in the sum of $262.70 making a total allowable claim which they subsequently filed in bankruptcy in the within proceedings in the sum of $6,987.48. However, the three creditors named herein above in the amounts as specified along with several other creditors failed to file a Mechanics

Lien or to commence a suit against the American Surety Company within the time allowed by law or pursuant to the terms of the bond. The three named creditors diligently filed allowable proofs of claim in the amounts specified above in the within bankruptcy proceedings and their claims were so allowed.

An objection to the entire claim the American Surety Company was heard before the undersigned Referee and the objection was disallowed and the claim was allowed as a general claim. Subsequently, it came to the attention of the Trustee that the three named cerditors set forth herein above were among the class of creditors for whom the bond, also described above, had been written and that their claims had not been paid. The Trustee filed a petition requesting the American Surety Company to show cause why the order now being appealed from should not be made and after a [32] stipulation as to the facts and considerable argument along with the presentation of memoranda of authority the matter was submitted to your Referee, for ruling.

The American Surety Company took the position that as long as the three named creditors had not perfected their lien or suit rights as against the American Surety Company outside of the bankruptcy proceedings that this Court had no right to allow by indirection what the three claimants could not have accomplished by direction. This argument obviously carries considerable weight but on the other hand examination of the legal authorities

indicates that the Supreme Court of the United States has taken a contrary position and that this has been sustained by recent cases that have followed the Supreme Court ruling. The authorities which your Referee has reference to appeared to conclusively hold that if there remain in the bankruptcy proceedings any allowable claims by creditors of the class for whose benefit the original surety bond was written then the Surety Company cannot participate in dividends from the estate until these creditors have been paid in full. Otherwise, the result would be to permit a Surety Company to participate in a liquidation of the assets of its principal before the obligees whom it has undertaken to protect have received their money in full. It appears to your Referee that although the three named creditors herein above did not take the burden of presenting the petition for the order to show cause that, nevertheless, it is the duty of the Trustee to present such matters to the Referee and upon ascertaining the true facts it would be the duty of the Referee to enforce the law applicable to the division or payment of any dividends from a bankrupt estate.

Attached to this certificate are the following documents:

1—Findings of Fact, Conclusions of Law and Order.

2—Petition for Review of Referee's Order by Judge.

3—Petition of Trustee for Order to Show Cause

directed to American Surety Company of New York.

4—Order to Show Cause re: American Surety Company of New York.

5—Claim of American Surety Company of New York [33]

6—Claim of Jack Campbell.

7—Claim of Probert Manufacturing Company.

8—Claim of Tony Stevens.

9—Stipulation as to certain facts re: Order to Show Cause re: American Surety Company of New York.

Dated: July 21, 1943.

Respectfully submitted.

ERNEST R. UTLEY,
Referee in Bankruptcy.

[Endorsed]: Filed July 26, 1943. [34]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE AMERICAN SURETY CO.

Pursuant to the verified petition of Paul W. Sampsell, Trustee in Bankruptcy in the within estate, an Order to Show Cause was issued directed to the American Surety Co. of New York, dated February 19, 1943, and pursuant to the Petition and Order to Show Cause a hearing was duly held thereon upon the 18th day of March, 1943, at the

hour of 10:00 A.M. before the undersigned Referee in Bankruptcy; that said Paul W. Sampsell was represented in court by Martin Gendel, Esq., his attorney, and the respondent American Surety Co. of New York was represented in court by Gordon F. Hampton, Esq. of the firm of Mathes & Sheppard, Esq.; evidence having been duly introduced and the matter having been duly argued and submitted, the undersigned Referee makes the following

FINDINGS OF FACT [35]

I.

That on or about January 3, 1941, Charles B. Stratton, bankrupt herein, doing business as Stratton Construction Company, applied to the American Surety Co., for a contract bond in connection with his contract with the General Electric Co. calling for him to make certain alterations in a factory building at Ontario, California, and the American Surety Co.; as surety and said C. B. Stratton as principal, executed Bond No. 582303-K, under a form designated as "Laborers & Materialmen, Statutory Form For California", a true copy of said bond being attached hereto, marked Exhibit A, and incorporated herein by reference as though set forth verbatim.

II.

That thereafter and on or about January 7, 1941, the plans and specifications for said alterations in said factory building, an executed copy of the construction contract dated January 2, 1941, between

C. B. Stratton, doing business as Stratton Construction Company, and the General Electric Company, and the original of said Bond No. 582303-K were filed and recorded in the office of the County Recorder of San Bernardino County, California, the county wherein said factory is located.

III.

That pursuant to said construction contract, C. B. Stratton, as original contractor, set about to effect said alterations in said factory building; that a notice of completion with respect to said alterations was filed and recorded in the office of said County Recorder on or about September 10, 1941, and that the time for laborers and materialmen to file and record claims of lien in connection therewith expired on or about October 10, 1941.

IV.

That within the time limited by law, the following laborers and materialmen furnishing work and supplying materials [36] to C. B. Stratton, as said original contractor, each filed and recorded claims of lien and lodged written notices with the American Surety Company, as surety, pursuant to the provisions of Section 1183 of the California Code of Civil Procedure; Soule Steel Company, Emil Brown & Company, Harold Shugat Company, Valley Window Cleaners, and Shattuck Lumber Company. That thereafter and on the dates specified in the claim herein of the American Surety Company, the American Surety Company, as surety, paid in full

each claim of the laborers and materialmen specified in this paragraph in the following amounts:

Soule Steel Company	$4,767.09
Emil Brown & Company	1,498.42
Harold Shugat ompany	265.78
Valley Window Cleaners	126.85
Shattuck Lumber Company	66.64
	$6,724.78

V.

That Jack Campbell, Probert Manufacturing Company, and Tony Stevens are laborers and materialmen furnishing work and supplying materials to C. B. Stratton as said original contractor; that none of the parties specified in this paragraph ever filed or recorded a claim of lien in connection with said alterations, nor did any of them ever give any notice, either written or oral to the American Surety Company; nor did either of them ever make any demand, either written or oral, upon the American Surety Company; nor did any of them ever communicate with the American Surety Company in any way; nor did any of them ever commence any suit or action against the American Surety Company.

That with respect to the furnishing and supplying of said work and materials specified in this paragraph, said parties have filed claims herein against the estate of the above named bankrupt as follows: [37]

Jack Campbell	$ 805.10
Probert Manufacturing Co.	385.00
Tony Stevens (Total claim filed $445.45)	146.01
	$1,336.11

That in addition to the above named parties who remain unpaid as specified, there are two other laborers and materialmen in connection with said alterations who remain unpaid in the sum of $259.13; that no claim has been filed herein for said sum of $259.13, or any part thereof.

VI.

That there are numerous other general unsecured claims against the Estate of the above named bankrupt, other than the three claimants named in the preceding paragraph.

VII.

That The American Surety Company filed a general claim in the within estate in the sum of $6,987.48, which claim arose because of moneys expended by it as surety for the bankrupt on said bond; that said claim of The American Surety Co. of New York, after objection thereto, was allowed in court as a general claim in the sum of $6,987.48 arising from payments and expenditures in connection therewith under said bond.

VIII.

That the aforesaid three claims of Jack Campbell, Probert Manufacturing Company and Tony

Stevens, are general claims; that as against the American Surety Company, personally, it would appear that they have no cause of action which they could bring under law; that the class of creditors for whose protection the above referred to bond was written, includes the within three named unpaid creditors.

The undersigned Referee makes the following

[38]

CONCLUSIONS OF LAW

I.

That unless all of the creditors of the class protected by the bond above described were paid in full, the American Surety Company would not be entitled to receive a dividend upon its general claim, even though the said Surety Company had paid the moneys for which it was legally obligated to those creditors who had diligently filed their claims against the said Surety Company; that the claims of Jack Campbell in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01, totalling the amount of $1336.11, were filed in the within bankruptcy proceedings within the time allowed by law and that said claims were allowed by this court.

II.

That to allow the Surety Company, by its indemnity contract, assignment or subrogation to receive consideration on its claim prior to the payment in full of the provable claims of the class or

creditors for whose protection the bond was originally written would be contrary to law and would defeat the purposes for which the bond was originally required, to wit, the protection of unpaid laborers and materialmen.

The undersigned Referee makes the following

ORDER

I.

The prayer of the Petition for the Order to Show Cause on behalf of the Trustee is hereby granted, and said Trustee, Paul W. Sampsell, Esq., is directed not to pay any dividend on the general claim of American Surety Company of New York in the sum of $6987.48 unless and until the claims of Jack Campbell, in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01 have been paid in full, and such amount of the dividend otherwise payable on the claim of the [39] American Surety Co. of New York as may be required when divided pro rata amongst the named three creditors, shall be applied on their claims, in addition to their ordinary dividend until their claims have been paid in full or the dividends otherwise payable to the American Surety Co. of New York, have been exhausted; after the said three creditors have been paid in full, then the balance remaining of the dividend otherwise payable to the American Surety Company of New York, if any, shall be paid to said surety company.

Dated this 15th day of June, 1943.

ERNEST R. UTLEY

Referee in Bankruptcy

Approved as to form:

MATHES & SHEPPARD,

By GORDON F. HAMPTON [40]

EXHIBIT A.

Know All Men By These Presents: That We, C. B. Stratton, doing business as the Stratton Construction Company as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact business under the laws of the State of California, as Surety, are held and firmly bound unto any and all persons, furnishing materials used in, upon, for or about the performance of the work contracted to be executed or performed under the contract hereinafter mentioned, and all persons who preformed work or labor upon the same, and all persons who supply both work and materials, and whose claim has not been paid by the contractor, company, or corporation, in the just and full sum of Thirty-Three Thousand Nine Hundred Fifty and No/100 ($33,950.00) Dollars, for the payment whereof well and truly to be made, said Principal and Surety bind themselves, their heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

"The Condition of the Foregoing Obligation Is Such, That Whereas the above bounden Principal

has entered into a contract, dated January 2, 1941, with General Electric Company to do and perform the following work, to wit: doing all alterations to factory building for the General Electric Company, Ontario, California.

Now Therefore, if the above bounden Principal shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work described in said contract or in any modification thereof, then this obligation shall be void; otherwise to remain in full force and effect. This bond shall inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in [41] said work, giving to such persons a right of action to recover hereon in any suit brought to foreclose mechanics liens arising under said contract or in a separate suit brought upon this bond in an amount not exceeding, however, in the aggregate of all recoveries, the amount of the bond as above specified.

No suit or action on this bond to recover for labor performed or material furnished in respect to to work herein referred to shall be sustained unless the same be commenced within the period provided by law after the claimant filed his claim of lien, or if he files no such claim of lien, unless the suit or action be commenced within six months after the contractor finally ceases operations on the work described in said contract.

Signed and Sealed this 3rd day of January, A.D., 1941.

Witness

AMERICAN SURETY COMPANY OF NEW YORK

By A. I. ZIMMERMAN
Resident Vice-President

Attest: LUCILE M. CHESLEY,
Resident Assistant Secretary

Received copy at 1:55 o'clock P.M. on the 9 day of June, 1943,

MATHES & SHEPPARD

By O. M. R.
Attorneys at Law

Filed Jun 15, 1943 at ..... min. past 10 o'clock A.M. Ernest R. Utley, Referee, Louise Rodgers, Clerk.

[Endorsed]: Filed Jul 26, 1943. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy. [42]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER BY JUDGE

To Ernest R. Utley, Esquire, Referee in Bankruptcy:

The petition of the American Surety Company of New York, a corporation, respectfully represents:

1. Your petitioner is a creditor of the above named bankrupt and petitioner's claim has been allowed in the total sum of $6,987.48.

2. Paul W. Sampsell, as the trustee in bankruptcy of the above named bankrupt, filed his petition herein for an order to show cause re American Surety Company and an order to show cause was issued thereon on February 19, 1943; said petition and order to show cause came on for hearing on March 18, 1943, and thereupon an order was entered on June 15, 1943, granting the prayer of said petition in the words and figures following: [43]

"ORDER

I.

The prayer of the Petition for the Order to Show Cause on behalf of the Trustee is hereby granted, and said Trustee, Paul W. Sampsell, Esq., is directed not to pay any dividend on the general claim of American Surety Company of New York in the sum of $6987.48 unless and until the claims of Jack Campbell, in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01 have been paid in full, and such amount of the dividend otherwise payable on the claim of the American Surety Co. of New York as may be required when divided pro rata amongst the named three creditors, shall be applied on their claims, in addition to their ordinary dividend until their claims have been paid in full or the dividends otherwise payable to the American Surety Co. of New York, have been ex-

hausted; after the said three creditors have been paid in full, then the balance remaining of the dividend otherwise payable to the American Surety Company of New York, if any, shall be paid to said surety company.

Dated this 15th day of June, 1943.

ERNEST R. UTLEY
Referee in Bankruptcy

The said order is erroneous for the following reasons:

(a) Said order is erroneous in that it deprives the American Surety Company of New York of its pro rata dividend to which it is entitled as a surety who has paid in full and made whole all creditors to whom it at any time became obligated as surety or othewise. [44]

(b) Said order is erroneous in that it orders that any dividend payable to the American Surety Company on its allowed general claim shall be first applied to the general claims of Jack Campbell, Probert Manufacturing Company, and Tony Stevens until such claims have been paid in full.

(c) Said order is erroneous in that it orders the dividend payable on the claim of the American Surety Company of New York to be limited to a sum less than a dividend "of an equal per centum" on an allowed claim in contravention of Section 65(a) of the Bankruptcy Act.

(d) Said order is erroneous in that it orders the dividends payable on each of the claims of Jack Campbell, Probert Manufacturing Company, and

Tony Stevens to be enlarged to sums greater than the "equal per centum" to be paid on other general claims, and thus said order contravenes the provisions of Section 65(a) of the Bankruptcy Act.

(e) Said order is erroneous in that it orders that the American Surety Company of New York be deprived of its pro rata dividend, and thereby said order deprives the American Surety Company of New York of property without due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States of America.

(f) Said order is erroneous in that it deprives the American Surety Company of New York of its contractual right to indemnity from the estate of said bankrupt by reason of the express contract of indemnity between the bankrupt and said company, and thereby said order deprives the American Surety Company of New York of property without [45] due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States of America.

(g) Said order is erroneous in that it deprives the American Surety Company of New York, as a general creditor, of its pro rata dividend from the general assets of the bankrupt's estate and grants to Jack Campbell, Probert Manufacturing Company, and Tony Stevens, as general creditors, all or part of the pro rata dividend belonging to the American Surety Company of New York.

(h) Said order is erroneous in that it orders seizure in bankruptcy of all or part of the pro

rata dividend properly payable from the general assets of the bankrupt's estate on the allowed claim of the American Surety Company of New York; further in that it orders such dividend sum to be paid to Jack Campbell, Probert Manufacturing Company, and Tony Stevens in addition to the pro rata dividends going to said parties as general creditors; and further in that it orders such seizure without regard for the fact that at no time did any of said parties have any cause of action against the American Surety Company of New York as surety or otherwise.

(i) Said order is erroneous in that it disregards the rule that a surety is entitled to indemnity, reimbursement, and subrogation from the estate of its bankrupt principal when such surety has paid in full and made whole all creditors to whom it is obligated as surety.

(j) Said order is erroneous in that, on behalf of three general creditors, it orders summary execution upon the pro rata dividend payable to the American Surety Company [46] of New York as another general creditor and as against whom said three general creditors have no cause of action at law or in equity or otherwise.

(k) Said order is erroneous in that it disregards the provisions of Bond No. 582303-K referred to in paragraph I of the findings of fact herein and thus accomplishes by indirection in bankruptcy that which could not be accomplished directly by any suit brought on said bond by Jack Campbell, Probert Manufacturing Company, or Tony Stevens.

(l) Said order is erroneous in that it disregards the provisions of Section 1183 of the Code of Civil Procedure of the State of California under which the American Surety Company of New York filed Bond No. 582303-K and thus accomplishes by indirection in bankruptcy that which could not be accomplished directly by any suit brought on said bond by Jack Campbell, Probert Manufacturing Company, or Tony Stevens.

(m) Said order is erroneous in that it amounts to the making of a new surety contract and subjecting the American Surety Company of New York to retroactive liability thereunder.

(n) Said order is erroneous in that it orders the creation of causes of action and places summary execution in the hands of three non-diligent general creditors of the bankrupt against another general creditor of the bankrupt and thus by said order a court of equity aids the non-diligent contrary to equitable principles.

(o) Said order is erroneous in that it purports to determine in bankruptcy a collateral dispute among certain general creditors of the bankrupt.

[47]

(p) Said order is erroneous in that Paul W. Sampsell, as Trustee, is not the real party in interest thereunder and had no standing to petition for said order for the reason that the real parties in interest under said petition and said order are Jack Campbell, Probert Manufacturing Company, and Tony Stevens, as general creditors herein.

Wherefore, your petitioner prays for a review of said order by the judge, and that said order be vacated and set aside.

Dated June 23, 1943.

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attorneys for Petitioner [48]

United States of America
Southern District of California
Central Division—ss.

A. E. Krull being by me first duly sworn, deposes and says: that he is the Resident Vice President of the Los Angeles Office of the American Surety Company of New York, a corporation, the petitioner in the above entitled cause; that he has read the foregoing Petition for Review of Referee's Order by Judge and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; that affiant makes this verification for and on behalf of the petitioner for the reason that the petitioner is a corporation and affiant is an officer thereof, to-wit, Resident Vice President, and has knowledge of the facts and is thereunto duly authorized.

A. E. KRULL

Subscribed and sworn to before me this 25 day of June, 1943.

[Seal] IVY TAYLOR

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Aug. 12, 1946. [49]

Received copy of the within petition this 25 day of June, 1943.

MARTIN GENDEL &
NAT ROSIN
By MARTIN GENDEL
Attorney for Trustee

Filed Jun 25, 1943 at ..... min. past 11 o'clock A.M. Ernest R. Utley, Referee. Louise Rodgers, Clerk.

[Endorsed]: Filed Jul. 26, 1943. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy. [50]

[Title of District Court and Cause.]

PETITION OF TRUSTEE FOR ORDER TO SHOW CAUSE, re AMERICAN SURETY CO.

To: Honorable Ernest R. Utley, Referee in Bankruptcy:

Comes now your petitioner, Paul W. Sampsell, as Trustee for the above named bankrupt, and respectfully represents as follows:

I.

That he is the duly elected, qualified and acting Trustee in the within estate.

II.

That heretofore the American Surety Co. of New York, a corporation, did file a claim in the within proceedings in the sum of $6,987.48; that said claim arose from the expenditure of the said amount of money, by virtue of the fact that the said claimant filed bond numbers, 582302-K and 582303-K, in the sum of $33,950.00 to secure the faithful performance of the contractor's obligations on alterations to a factory building being constructed [54] for the General Electric Company in Ontario, California; that the contractor whose acts were bonded by the American Surety Co. of New York is the bankrupt herein; that after a hearing upon an objection to the claim itself, said claim was allowed as a general claim in the sum of $6,987.48.

III.

That subsequent to the hearings on the objections to the claim, your petitioner has ascertained that of the creditors of the class for whom said bond was written by the American Surety Co. there remains unpaid approximately five of said creditors; that three of said creditors, to wit, Propert Mfg. Co. in the sum of $385.00, Jack Campbell in the sum of $805.10 and Tony A. Stevens have filed claims in the within bankruptcy proceedings arising from said General Electric job, and it further appears that the said creditors were not paid by the American Surety Co. of New York for the reason that they had not filed their claims with the company within the time prescribed by law; that the total amount

of claims which have been filed in the within estate and which represent creditors of the class for which the bond was written, total the sum of $1336.11.

IV.

That from the facts and the law applicable thereto, it appears to your Petitioner that any dividend which might otherwise be payable to the American Surety Co. of New York on its claim of $6,987.48 should be pro rated to the three creditors named herein above; in addition to their normal pro rata dividend as general unsecured creditors the difference of the dividend otherwise payable to the American Surety Co. of New York should be applied until their three claims have been paid in full and not until then should the balance remaining of the percentage of the general dividend otherwise payable to the American Surety Co., be paid to it.

[52]

Wherefore, this Petitioner prays that this court issue an Order directing the American Surety Co. of New York to show cause why the dividend which would otherwise be payable to it on its general claim should not be applied to the three accounts specified in the within petition until said creditors have been paid in full, and then the balance of the dividend, if any, paid to the said American Surety Co. of New York.

Dated: February 18th, 1943.

PAUL W. SAMPSELL,
Petitioner.

MARTIN GENDEL and
NAT ROSIN,
By MARTIN GENDEL,
Attorneys for Trustee.

(Duly Verified by Paul W. Sampsell.) [53]

Filed Feb. 23, 1943 at 45 Min. past 3 o'clock P. M. Ernest R. Utley, Referee; Louise Rodgers, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [55]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE AMERICAN SURETY CO. OF NEW YORK

To: The American Surety Co. of New York, and to E. B. Howorth, Esq., its attorney:

Upon reading and filing the verified petition of Paul W. Sampsell, Trustee, and good cause appearing therefrom, and upon the motion of Martin Gendel and Nat Rosin, Attorneys for the Trustee, said American Surety Co. of New York is hereby directed to appear before the undersigned Referee at his court room located on the third floor of the Federal Building, Los Angeles, California, on the 4th day of March, 1943, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard, and

then and there to show cause why the prayer of the petition for the order to show cause, a copy of which is attached hereto, should not be granted.

Dated this 23rd day of February, 1943.

ERNEST R. UTLEY,
Referee in Bankruptcy. [56]

(Affidavit of Service by Mail.)

Filed Feb. 23, 1943 at . . Min. past 5 o'clock P. M. Ernest R. Utley, Referee; Louise Rodgers, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [58]

[Title of District Court and Cause.]

PROOF OF CLAIM OF AMERICAN SURETY CO. OF NEW YORK

State of New York
County of New York—ss.

At the Borough of Manhattan, in the City, County and State of New York, on the 9th day of January, 1942, personally appeared William Goetz of Jamaica, in the City of New York, in the County of Queens and State of New York, and made oath as follows:

That he is Treasurer of the American Surety Company of New York, a corporation incorporated under and by virtue of the laws of the State of New York and having its principal office and place of business at 100 Broadway, in the Borough of

Manhattan, in the City, County and State of New York; that said corporation is licensed to do business in the State of California.

That the said bankrupt against whom a petition for adjudication of bankruptcy has been filed was at and before the filing of said petition, and still is, justly and truly indebted to the American Surety Company of New York in the sum of $6,987.48; that the cause of said debt is as follows; that on or about the 3rd day of January, 1941, said bankrupt made written application to the American Surety [59] Company of New York to act as his surety in the amount of $33,950.00 in favor of all persons furnishing materials used in, upon, for or about the performance of the work contracted to be executed or performed under the contract dated January 2, 1941, between the General Electric Company and C. B. Stratton, doing business as the Stratton Construction Company, and in connection with a bond dated January 3, 1941, executed by C. B. Stratton, doing business as the Stratton Construction Company, as principal, American Surety Company of New York, as surety, and General Electric Company, as owner, in the amount of $33,950.00, in connection with a contract dated January 2, 1941, between the principal and the owner for alterations to factory building for the General Electric Company at Ontario, California, and in and by said application, the said bankrupt did, among other things, agree that he would at all times indemnify and save the surety harmless from and against any claim of every nature whatsoever, including counsel fees, and

would place the surety in funds sufficient to defray all expenses and judgments that may be rendered thereon.

That on the 3rd day of January, 1941, the said American Surety Company of New York did, as surety, execute its bonds as aforesaid for the said C. B. Stratton, doing business as the Stratton Construction Company.

That thereafter claims were filed against the American Surety Company of New York by individuals and concerns who furnished labor and materials to the C. B. Stratton Construction Company in connection with the prosecution of the work covered by the contract between the C. B. Stratton Construction Company and General Electric Company dated January 2, 1941.

That on the 13th day of December, 1941, American Surety Company of New York paid, as surety for the said bankrupt, the sum of $4,767.09 to Soule Steel Company, $1,498.42 [60] to Emil Brown and Company, $265.78 to Harold Shugat Company, $126.85 to Valley Window Cleaners, $66.64 to Shattuck Lumber Company for a total of $6,724.78; that the said surety did further expend in ascertaining as to the correctness of its liability the sum of $253.50 to Robert M. Larson, a certified Public Accountant of Pasedena, California, and the sum of $9.20 to E. B. Howorth for services and disbursements as is set forth on the statement attached hereto and made a part hereof and for all of which said sums the said bankrupt, under his agreement

of indemnity, photostat copy of which is attached hereto and made a part hereof, is made liable.

That no part of said debt has been paid; that there are no off-sets or counter claims therefo; that no judgment has been rendered on said debt; that the said American Surety Company of New York has not, nor has any person by its order, or to its knowledge or belief for the use of the said American Surety Company of New York, had or received any amount of security from the said bankrupt for any debt whatsoever.

Said claimant hereby constitutes and appoints E. B. Howorth claimant's true and lawful attorney in fact to represent said claimant in said matter, with full power to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings, or any adjurnment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of the undersigned to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bank-
[61] rupt, and for the undersigned to assent to such appointment of trustee, and with like authority and powers to attend and vote at any other meeting or

meetings of creditors, or sitting or sittings of the Court, which may be held therein or for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due the undersigned under any composition, and for any other purposes whatsoever in the interests of the undersigned, with full power of substitution, and the undersigned does hereby revoke any and all prior powers of attorney that may have been given by the undersigned.

WILLIAM GOETZ,
Treasurer of the American Surety Company of New York.

Subscribed and sworn to before me this 9th day of January, 1942, and also acknowledged on this day by the subscriber, who is personally known to me.

[Seal] JAMES S. PRIEST, SR.,
Notary Public, Queen's County. Queens Co. Clerk's Ctf. #3719; Register's #8801. Kings Co. Clerk's Ctf. #64; Register's #3233. New York Co. Clerk's Ctf. #633; Register's #3-P-391. Commission Expires March 30, 1943. [62]

Surety Salvage

American Surety Company of New York

Salvage No. 187748

STATEMENT OF ACCOUNT IN THE CASE OF
C. B. STRATTON

CLAIM PAID

12-20-41	Soule Steel Company	$4,767.09	
12-20-41	Emil Brown & Company	1,498.42	
12-23-41	Valley Window Cleaners	126.85	
12-23-41	Shattuck Lumber Company	66.64	
12-29-41	Harold Shugat Company	265.78	
			$6,724.78

EXPENSES

11- 4-41	E. B. Howorth	$ 9.20	
11- 4-41	Robert M. Larson	253.50	262.70
	Balance Due as of 1-9-42		$6,987.48

VWN-DLM
1-9-42

[63]

Agency at.....State of.....
Name .....
(Agent or Attorney)
Branch Office at.....
Bond No. 582302-K
582303-K
Sub. Ag'y Bond No.....

(Cut)
Company's Home Office
Building
American Surety Company
of New York
(Organized 1884)

Application for Contract, Bid or Maintenance Bond

Note—These should accompany this application:

1. Financial Statement, Form C 703 with schedules.
2. Copy of Contract, or in case of a bid, of advertisement, instructions and bid showing date and signatures. (Copy contract to follow.)
3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Place and Date of this Application) ..... (Place) ..... 19.. (Date)

To American Surety Company of New York

Application is hereby made for a bond of suretyship, as follows:

1. Name and business address of applicant.
   (In the case of a partnership add name of each partner; in the case of a corporation add names of the four principal officers, and state date of organization or incorporation.)

C. B. Stratton doing business as Stratton Construction Company

2. Name and address of obligee to whom bond is to be given
(Give full name as per contract.)
General Electric Company

3. Give concise description of proposed work, and location Alterations to factory building for the General Electric Company, Ontario, California.

4. Place and date of bid opening, if any.....

5. Date of Contract Jany 2, 1941

6. Contract price, $33950.00

7. Time for completion.....

8. Penalty for delay.....

9. Terms of payment, and reserved percentage....

10. Terms and duration of guarantees of efficiency, maintenance and repairs, if any, in contract or specifications .....

10a. Is maintenance to be covered by this bond?...

11. Amount of bond F.P. $33,950.00
L.M. $33,950.00

12. Time limit for suit.....

13. Name and address of architect or engineer in charge .....

13a. State whether Fire Insurance will be placed by you or by the owner.....

14. Will you sublet any part of the work? If so, state nature and amount.....

15. Will you require subcontractors to give bonds? Corporate or private? ..... [64]

[Printed in Margin]: Note—If the required information is not given in response to the foregoing questions, it may be necessary to return this blank for completion. The answers will be treated as strictly confidential.

16. Give all other bids. If more than 5 bids tabulate on separate sheet and attach.

[No Entries]

17. Name 2 or 3 large contracts that you have completed similar to the one here considered, giving in each case

[No Entries]

18. State number of years experience as contractor

19. List of contracts now being performed, with location, amount and percentage completed.

[No Entries]

20. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result.

.....

21. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? .....

22. Are you engaged or interested in any other line of business? If so, state its nature, location, firm name, names of partners, etc.

.....

23. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way became discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed.....

24. Do you carry Messenger or Paymaster Robbery or Hold-up Insurance?.....
If so, give particulars.....

24a. Have you arranged for Public Liability, Property damage and Fire Insurance to cover this particular project? .....[65]

[Printed in Margin]: Note—If the required information is not given in response to the foregoing questions, it may be necessary to return this blank for completion. The answers will be treated as strictly confidential.

25. References. Give name of your banker, an architect or engineer, an owner, also supply houses who have granted you credit.

[No Entries]

Should the American Surety Company of New York, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for or other suretyship in lieu thereof, or in connection therewith, the undersigned, hereinafter called the Indemnitor, does (if there be more

than one Indemnitor they jointly and severally and for each other do) in consideration thereof hereby undertake and agree:

I. That the statements contained in the foregoing application are true.

II. That the Indemnitor will immediately pay the Surety the premiums herein agreed upon, to wit:

(a) Proposal Or Bid. If the bond be a "Proposal" or "Bid" bond $..... in advance; if, however, such "Proposal" or "Bid" bond shall by its terms, operate as a "Contract" bond then the regular charge for a contract bond, as provided in the next three succeeding paragraphs marked (b) (c) and (d). If the "Proposal" or "Bid" bond be superseded by a final "Contract" bond of the Surety the premium charge for such proposal or bid bond will be credited on the premium for the contract bond.

(b) Contract Bond. If the bond be a "Contract" bond, or similar instrument, covering the performance of the contract or indemnifying against its non-performance, $509.25 in advance, for the term of 24 months and annually thereafter a premium calculated at the rate of .... per cent on the amount of unfinished contract at each annual renewal. Should the amount of the contract herein stipulated, and upon which premiums are based, be increased or decreased, it is understood and agreed that the premium will be adjusted accordingly, calculated at the date upon which the premium hereinabove stipulated is calculated.

(c) Maintenance Or Guarantee. If any maintenance or guarantee of the work, after completion, is provided for in the contract, for a term exceeding one year, for which either the contract bond or any separate bond which may be executed is liable, the undersigned agrees to pay the Surety in advance for the entire term of said maintenance guarantee a premium of $.....

(d) The contract premium, if there be no maintenance or guarantee, will be paid as above, until the Surety shall be discharged or released from any and all liability and responsibility upon said bond, and all matters arising therefrom, and competent written legal evidence of such discharge or release, satisfactory to the Surety, is served thereon at its Home Office in the City of New York. Where the contract bond covers any maintenance or guarantee of the work, the contract premium will be paid, as above, until the undersigned furnishes the Surety with like evidence of the completion of the contract, which will be the commencement date of maintenance and maintenance premium.

III. That the Indemnitor will perform all the conditions of the bid and/or contract bond herein, and any and all alterations, modifications, renewals and extensions thereof, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the surety deemed necessary) expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet the same

before it shall be required to make payment and in case the Indemnitor requests the Surety to join in the prosecution or defense of any legal proceeding, the Indemnitor will, on demand of the Surety, place it in funds sufficient to defray all expenses and all judgments that may be rendered therein.

IV. That the suretyship is for the special benefit of the Indemnitor and the Indemnitor's property now owned or hereafter acquired and the income and earnings thereof, from all of which the Surety shall be entitled to indemnity; and the Indemnitor represents that it is specially and beneficially interested in the award or contract, the continuance thereof and in the suretyship.

V. That the Surety shall have every right and remedy, which a personal surety without compensation would have, the right to secure its discharge from its suretyship, and should it make payment hereunder, shall have every right and remedy of the Indemnitor for the recovery of the same. The Surtey is hereby expressly authorized to fill up any blanks left herein, and to correct any errors in the description of said bond or bonds or any of them, or in the amount or date of payment of said premium or premiums.

VI. That this agreement shall cover the suretyship above recited and all alterations, renewals, extensions and modifications thereof which may be requested or assented to by the Indemnitor or by the Principal named in the bond or obligation. The Surety is hereby authorized to assent to any

changes in or modifications of the contract, plans, specifications, bond and suretyship without notice to or the request of the Indemnitor. That the Surety shall have the right to pay or compromise any expense, claim or charge of the character enumerated in this agreement, and the voucher or other evidence of such payment shall be prima facie evidence of the propriety thereof and of the Indemnitor's liability therefor to the Surety.

VII. That the release by the Surety of any indemnity or security by it held, or the acceptance by the Surety of other or additional security, indemnity or consideration, shall not be a waiver of any right or remedy of the Surety; nor shall it release the Indemnitor from any obligation hereunder.

VIII. That the Indemnitor hereby dedicates all plant and material owned or acquired by it to the performance of the contract referred to herein and further agrees in the event of failure to complete or carry on the contract covered by said suretyship to assign and does hereby assign to the said Surety, all right, title and interest of the Indemnitor in and to all the tools, plant, equipment and materials of every nature and description that the Indemnitor may have upon the work provided for in the contract covered by said suretyship, or in, on or about the site thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction, on storage elsewhere, or in transportation to said site; and the Indemnitor further agrees to assign and hereby

does assign to the said Surety, all the former's rights in and to all sub-contracts which may be entered into and the materials embraced therein appertaining to said contract; and the Indemnitor further agrees in the event of any breach or default on his part in any of the provisions of the contract and/or bond that the said Surety, as surety, shall be subrogated to all the rights and properties of the Indemnitor in such contract, including deferred and reserved payments, current and earned estimates and final payments, and any and all moneys and securities that may be due and payable at the time of such default on this or any other contract of the Indemnitor or any one or more of them on which the Surety is or may become surety, or on account of extra work or materials supplied in connection therewith, or that may thereafter become due and payable on account of said contract or any other contract of the Indemnitor or any one or more of them on which the Surety is or may become surety.

[Printed in Margin]: If this application is declined the Company reserves the right to withhold the reason therefor, if deemed necessary, as all information relative thereto is regarded as confidential.

IX. All the terms and conditions of this agreement shall stand for the protection of any co-surety, any reinsuring company or any other surety procured by the American Surety Company of New York above named, whether the American Surety

Company of New York does or does not execute or retain any portion of any such obligation.

X. That in case of the failure of any Indemnitor to execute this obligation, or if the execution hereof by any one or more Indemnitors shall be invalid or defective, the remaining Indemnitors shall be and remain as fully liable as if such defect or invalidity had not existed.

XI. Pronouns appearing in this agreement, whether singular or plural, are to be construed as referring to the Indemnitor, though the Indemnitor be one or more individuals, partnerships, associations or corporations.

.....

.....

.....

Signed and sealed Jany 3rd, 1941.

Signed, sealed and delivered in presence of:
C. I. (Illegible)

Applicant sign here
(Seal) C. B. STRATTON
MRS. C. B. STRATTON

Acknowledge Signatures On This Page
[No Entries]

Filed Jan 13, 1942 at .... min. past 10 A.M. Ernest R. Utley, Referee in Bankruptcy, by Louise Rodgers, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [66]

[Title of District Court and Cause.]

PROOF OF DEBT AND LETTER OF ATTORNEY

Jack Campbell, Claimant

At Los Angeles, in the Southern District of California, on the 21st day of November, 1941, came Jack Campbell of South Gate, in the County of Los Angeles, in said district, personally known to me, and made oath and says:

I.

(1) Deponent is the owner of the business known as ..... and trades under that name.

(2) Deponent is a member of the partnership firm of ..... consisting of himself and ..... of ..... in the County of ....., and State of ..... and is duly authorized to execute the letter of attorney incorporated herein and has executed the same on behalf of said firm.

(3) Deponent is an officer (or agent), to wit: ..... of ....., a corporation incorporated by and under the laws of the State of ..... and carrying on business at ..... in the County of ....., and State of ..... and is duly authorized to make this proof and execute the letter of attorney incorporated herein, and has executed such letter of attorney on behalf of said corporation.

(4) Deponent is the attorney (or authorized agent) of ..... in the County of ..... and State of ..... This deposition cannot

be made by said principal in person because.....
.....and deponent is duly authorized by his said principal to make this affidavit and to execute the letter of attorney incorporated herein and has executed such letter of attorney on behalf of said principal, and it is within his knowledge that the hereinafter mentioned debt was incurred as and for the consideration hereinafter mentioned, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

II.

The above named bankrupt ....., the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said claimant in the sum of $897.50 and the nature and consideration of said debt are as follows: Labor, services, goods, wares and merchandise sold and delivered within four years last past by the claimant, ~~an~~ itemized bills of which, marked Exhibit "A," and Exhibit "B" are hereto annexed and referred to as a part hereof. (5).

.....
.....

that no part of said debt has been paid, no note has been received, nor judgment rendered for said indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said

claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security whatever for said debt, that the within claim is free from usury as defined by the laws of the place where the debt is contracted.

[Printer's Note]: Large checkmark over face of this paragraph.

III.

Said claimant hereby constitutes and appoints Bruhnke & Silver and/or Martin Gendel or their representatives and each of them, claimant's true and lawful attorney in fact to represent such claimant in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt, aforesaid, at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court, in said matter, or at such other time and place as may be appointed by the Court, for holding such meeting or meetings, or at which meeting or meetings, or any adjournment or adjournments, thereof, may be held, and then and there from time to time, and as often as there may be occasion for and in the name of claimant, to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress, relating to bankruptcy; and in the choice of trustee or trustees, of the estate of said bankrupt, and for claimant to assent to such appointment of trustee, and with the powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings, of the court, which may be held therein for any other purposes aforesaid; also

to accept or reject any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money to claimant under any composition or otherwise, and for any other purpose whatsoever, in the interest of claimant, with full power of substitution, and claimant does hereby revoke any and all prior Powers of Attorney that may have been given by the claimant.

Personal signature here only (6)

JACK CAMPBELL
Deponent

(Do not sign Firm or Corporate Name.)

Claimant or as such officer, member, agent or attorney of Claimant.

Subscribed, sworn and acknowledged before me this 21st day of November, 1941.

[Seal] S. ROBERSON

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Sept. 12th, 1943. [67]

Directions

Important

(Notes and other writings received and copies of invoices must be attached. Mere statements are insufficient, itemized invoices are required.)

If Claimant a Corporation

The claim must be signed by a duly authorized officer of the Corporation.

If Claimant a Partnership

Use bracket (2).

If Claimant an Individual Using a Trade Name

Use bracket (1).

If Claimant an Individual Is a Creditor Under His Own Name

Ignore brackets (1) to (4) inclusive.

If Claimant an Individual or Partnership Acting by Agent

Use bracket (4). Do not make proof this way unless absolutely necessary as sufficient reasons must be given why proof not made by principal or same is void.

General Directions

If the consideration is not goods sold and delivered, blank space (5) may be used to set forth the true consideration, where the claim is based on a promissory note, or other writing, the consideration for the same must be stated. In bankruptcy, such writings do not import consideration as in State court. The signature at blank space (6) must always be that of the individual who makes the proof. No Corporate, Partnership or Principal's Name Must Appear Here or the Proof Will Be Void. Claims must be filed in the office of the Referee, within six months from the date of adjudication in Bankruptcy but a claim filed within the six months period, may, for good cause, be amended at any time prior to the conclusion of the final dividend meeting.

EXHIBIT A

Phone LAfayette 6432

Jack Campbell
Service Station Painting

2782 Firestone Blvd.
South Gate, Calif.

November 19, 1941

To Whom it may concern,

As proof of claim against Stratton Construction Co. 119 North Oak Street, Temple City, California Debt consists of labor only, furnished on building of General Electric Corp. Officies and Plant at Hot Point, Ontario, California

Original Contract dated May 5th. 1941 for Sum of $1510.00

Extras or additional work added to as work progressed 646.50

Balance $2156.50

Received in checks and cash as part payment 1232.57

Deducted from my invoice in payment of bill 923.93

owed Temple City Building Materials Co. for purchase of paint, etc. ..... $ 118.83

Balance due ..... $ 805.10

Work Completed September 4th. 1941

JACK CAMPBELL [69]

EXHIBIT B

Phone LAfayette 6432

Jack Campbell
Service Station Painting

2782 Firestone Blvd.
South Gate, Calif.

November 19, 1941

To Whom it may concern
As proof of claim against Stratton Construction Co.
119 North Oak Street, Temple City, California
Debt consists of labor only, furnished on cooking building of South Santa Anita School North Oak St. Temple City, Calif.
Total invoice $92.40
Work started Sept. 24, 1941
Work Completed Oct. 8, 1941

JACK CAMPBELL

Filed Jan. 13, 1942. Ernest R. Utley, Referee, by Louise Rodgers, Clerk.

[Endorsed]: Filed Jul. 26, 1943 at 45 min. past 4 o'clock P.M. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [70]

[Title of District Court and Cause.]

PROOF OF CLAIM AND POWER OF ATTORNEY

(1) Tony Stevens

(2) Claimant's Social Security No. 559-20-0260

State of California,
County of Los Angeles—ss.

(3) S. W. Godfrey of 1102 So. Edith, City of Alhambra, County of Los Angeles, State of California, being duly sworn, deposes and says:

(4) That deponent is transacting business under fictitious name of .....

(5) That deponent is a member of ....., a copartnership composed of deponent and .....

.....

(6) That deponent is the ..... of ..... a corporation organized and existing under the laws of the State of ....., and that he is duly authorized to make this proof of claim and to execute the power of attorney herein contained on its behalf.

(7) That deponent is the attorney, or agent, of the claimant and that he is duly authorized by said claimant to make this proof of claim and to execute the power of attorney herein contained in his behalf; and that said proof cannot be made by said claimant in person because agent

.....

That the above named bankrupt was at and before the filing by or against him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted or liable to (8) Tony Stevens in the sum of $445.45 (9).

That the consideration of said debt or liability is as follows: (10) .....

.....

That no part of said debt or liability has been paid and that there are no set-offs or counterclaims thereto; that said claimant does not hold, and has not, nor has any person by his order, or to deponent's knowledge or belief, for his use, had or received, any security or securities for said debt or liability; that the instrument upon which said debt or liability is founded is attached hereto, or is lost or destroyed as set forth in the affidavit attached hereto; that no note or other negotiable instrument has been received for said debt or liability, or any part thereof, except such as is attached hereto; and that no judgment has been rendered on said debt or liability, or any part thereof, except as herein stated.

POWER OF ATTORNEY

Said claimant hereby authorizes (11) G. W. Godfrey of 1102 So. Edith, Alhambra, Calif or any of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for him and in his name to vote for or against any proposal or resolution that may be then submitted under the Act of Congress

relating to bankruptcy, to vote for a trustee or trustees of the estate of the said bankrupt and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due said claimant under such arrangement or wage-earner's plan, and for any other purpose in said claimant's interest whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

[Printer's Note]: Large checkmark placed through two paragraphs.

Designation of Address to Which Notices Shall Be Addressed:

Said claimant hereby requests that all notices to which he may be entitled shall be addressed to the person named in the foregoing Power of Attorney, at his address as therein designated; if no person is named in said Power of Attorney, said claimant requests that said notices be sent to him at the following address:

(12) 1102 So. Edith, Alhambra, Calif.

(13) TONY A. STEVENS

(Personal signature of deponent; do not sign name of claimant unless the claimant and the deponent are the same.)

Subscribed, sworn to and acknowledged before me this 29 day of January, 1942.

[Notarial Seal] N. S. FARRELL

Notary Public in and for the County of Los Angeles, State of California. [71]

Directions

(The numbers refer to the corresponding numbers appearing on the face of this form.)

Distinction Between Claimant and Deponent

The name of the bankrupt must be inserted.

The name of the claimant must be shown in the spaces marked (1) and (8). The name and address of the deponent must be shown in the spaces marked (3). The "claimant" is the person, business, copartnership, corporation, or other legal entity, asserting the claim against the bankrupt. The "deponent" is the individual who makes the claim for or on behalf of the claimant. If the claimant is an individual who is not transacting business under a fictitious name, and if he makes the claim himself, and not by his attorney or agent, the claimant's name and the deponent's name will be the same.

Character of Claimant and Deponent

If the claimant is an Individual Transacting Business Under a Fictitious Name, the fictitious name he uses must be inserted in the bracket marked (4).

If the claimant is a Copartnership, the information required in the bracket marked (5) must be given.

If the claimant is a Corporation, the information required in the bracket marked (6) must be given.

If the deponent is the Attorney or Agent of the Claimant, the information required in the bracket marked (7) must be given.

Amount of Claim

The total amount claimed by the claimant must be given in the space marked (9). If the claim is on An Unsecured Interest Bearing Obligation, the interest should be computed to the date of the filing of the petition for adjudication of bankruptcy, and such interest should be added to the unpaid principal and included in the amount which is shown in the space marked (9). The details of unpaid principal and interest may be shown in the space marked (10) or on a separate sheet attached to the claim.

Consideration Upon Which Claim Is Made

The consideration of the debt or liability upon which the claim is made should be briefly stated in the space marked (10). If the space is not sufficient, a separate sheet should be attached. If the claim is for Goods, Wares or Merchandise, itemized invoices should be attached; if the claim is on a Note or Other Written Instrument, the original thereof should be attached; if the claim is on a Judgment, an abstract thereof should be attached; if the claim is for Wages, Salary or Other Compensation for Services Rendered, the details thereof should be stated, such as the dates when the services were rendered, the rate of compensation, the payments received on account, if any, etc.; if the claimant Claims Priority, in whole or in part, for the reason that his services were rendered Within Three

Months Before the Date of the Commencement of the Proceeding, he should so state on the face of the claim. On all claims for wages, salary or other compensation, the Social Security number of the claimant must be given in the space marked (2).

Power of Attorney

If the claimant so desires, he may insert in the blank spaces marked (11) the name and the address of the person he wishes to appoint, as his attorney in fact, to act for him in connection with his claim, and to receive payment of dividends or other money or other consideration due the claimant.

Designation of Address to Which Notices Shall Be Addressed

If the claimant does not designate an attorney in fact, his own address should be given in the space marked (12).

Signature on Claim

The deponent must sign his own name on the line marked (13). The name of the claimant must not appear on this line unless the claimant and the deponent are one and the same. [72]

[Letter Head]
Tony A. Stevens

1102 S. Edith St., Alhambra
Phone ATlantic 2-5270

Stratton Construction Co.

Statement of Acct. with Tony Stevens

11/28/40	Ventura Blvd. & Rosetta	$ 28.35
7/14/41	General Electric, Ontario	246.01
8/18	Ocean Ave., Santa Monica	25.00
8/22	Extra Work—Gen. Elec.	392.00
9/	Santa Anita School	65.00
	Total	$756.36
	Less Cr. on Gen. Elec.	100.00
	Balance owes T. Stevens	$656.36
[In longhand]:	Due Temple City Bldg. Material Co—from Tony Stevens	210.91
	Balance due Tony Stevens	$445.45

Filed Jan. 30, 1942. Ernest R. Utley, Referee, by Blanche Morris, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [73]

[Title of District Court and Cause.]

PROOF OF CLAIM

At Los Angeles, in the Southern District of California on the 17th day of November, 1941, came Edwin R. Probert of Los Angeles, County of Los Angeles, State of California and made oath and says:

That he is an officer of Probert Mfg. Co. Ltd., a corporation incorporated by and under the laws of the State of California, and carrying on business at Los Angeles, County of Los Angeles, State of California and that he is an officer duly authorized by said corporation to make this Proof of Debt and execute this Letter of Attorney, and executed same on behalf of said corporation.

That the said C. B. Stratton d b a Temple City Bldg. Materials Co., and Stratton Constr. Co., the person whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said claimant, in the sum of Three Hundred & Eighty Five Dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered within four years last past by the claimant, an itemized bill of which, marked Exhibit "A," is hereto annexed and referred to as a part hereof.

[Printer's Note]: Large checkmark through this paragraph.

That no part of said debt has been paid, no note has been received, nor judgment rendered for said

indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security whatever for said debt. That the within claim is free from usury as defined by the laws of the place where the debt was contracted.

Said claimant hereby constitutes and appoints, L. G. Moore or their representatives and each of them, its true and lawful attorney in fact to represent said claimant in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advised or directed to be holden, on the day and at the hour appointed and notified by said Court of said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of claimant to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankruptcy, and for claimant to appoint such trustee or trustees and with like powers to attend and vote at any other meeting or

meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept or reject any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due claimant under any composition or otherwise and for any other purpose whatsoever in the interest of claimant to perform acts and execute consents and documents with full power of substitution and claimant does hereby revoke any and all prior powers of attorney that may have been given by claimant.

EDWIN R. PROBERT,
Sec. Treas.
PROBERT MFG. CO. LTD.

Subscribed and sworn to before me this 17 day of November, A. D. 1941, and also acknoweldged on this date by the subscriber, who is personally known to me.

[Seal] OSCAR E. CLINK,
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires Aug. 16, 1942. [74]

Instructions for Execution

This instrument should be executed strictly in accordance with the following instructions:

1. If individual, sign on line so indicated.
2. If partnership, member of firm must sign on line so indicated and fill out partnership paragraph, giving name or names of the members of firm.
3. If corporation, an officer should sign on line so indicated and fill out corporation paragraph.

4. All proofs of debt must be acknowledged before a Notary Public.

5. Attach Itemized Statement, Copies of Invoices and Original Promissory Note, if any.

Filed Nov. 29, 1941. Ernest R. Utley, Referee; Blanche Morris, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [75]

[Title of District Court and Cause.]

STIPULATION AS TO CERTAIN FACTS RE ORDER TO SHOW CAUSE RE AMERICAN SURETY COMPANY OF NEW YORK

It Is Hereby Stipulated by and between Paul W. Sampsell, as Trustee for the above named bankrupt, and the American Surety Company of New York, a corporation, through their respective attorneys thereunto duly authorized, as follows:

I.

That the facts in this stipulation may be used by any party or person interested in the above entitled matter and at any stage of the proceedings therein; and that such facts are to be considered in connection with all facts properly inferred, presumed or deduced from all papers now on file herein. [76]

II.

That on or about January 3, 1941, C. B. Stratton, doing business as Stratton Construction Company,

applied to the American Surety Company for a contract bond in connection with his contract with the General Electric Company calling for him to make certain alterations in a factory building at Ontario, California; that said C. B. Stratton is the same person as Charles B. Stratton.

III.

That a true copy of said application and contract of indemnity and reimbursement of said C. B. Stratton in favor of the American Surety Company is attached to the claim herein of the American Surety Company heretofore allowed as a general claim in the sum of $6,987.48.

IV.

That pursuant to said application of C. B. Stratton, the American Surety Company, as surety, and C. B. Stratton, as principal, executed bond No. 582303-K under a form designated as "Laborers & Materialmen, Statutory Form For California" and in words and figures and under date as follows:

"Know All Men By These Presents: That We, C. B. Stratton, doing business as the Stratton Construction Company as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact business under the laws of the State of California, as Surety, are held and firmly bound unto any and all persons, furnishing materials used in, upon, for or about the performance of the work contracted to be executed or [77] performed under the contract hereinafter

mentioned, and all persons who performed work or labor upon the same, and all persons who supply both work and materials, and whose claim has not been paid by the contractor, company, or corporation, in the just and full sum of Thirty-Three Thousand Nine Hundred Fifty and No/100 ($33,950.00) Dollars, for the payment whereof well and truly to be made, said Principal, and Surety bind themselves, their heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

"The Condition of the Foregoing Obligation Is Such, That Whereas the above bounden Principal has entered into a contract, dated January 2, 1941, with General Electric Company to do and perform the following work, to-wit: doing all alterations to factory building for the General Electric Company, Ontario, California

"Now Therefore, if the above bounden Principal shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work described in said contract or in any modification thereof, then this obligation shall be void; otherwise to remain in full force and effect. This bond shall inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in said work, giving to such persons a right of action to recover hereon in any suit brought to foreclose mechanics liens arising under said contract or in a separate suit brought upon this bond in an amount

not exceeding, however, in the aggregate of all recoveries, the amount of the bond as above specified.

[78].

"No suit or action on this bond to recover for labor performed or material furnished in respect to work herein referred to shall be sustained unless the same be commenced within the period provided by law after the claimant files his claim of lien, or if he files no such claim of lien, unless the suit or action be commenced within six months after the contractor finally ceases operations on the work described in said contract.

"Signed and Sealed this 3rd day of January A. D. 1941

Witness .....

AMERICAN SURETY COMPANY OF NEW YORK,

By A. I. ZIMMERMAN,
Resident Vice-President.

Attest: LUCILE M. CHESLEY,
Resident Assistant Secretary"

V.

That thereafter and on or about January 7, 1941, the plans and specifications for said alterations in said factory building, an executed copy of the construction contract dated January 2, 1941, between C. B. Stratton, doing business as Stratton Construction Company, and the General Electric Company, and the original of said bond No. 582303-K were filed and recorded in the office of the County Recorder of San Bernardino County, California, the county wherein said factory is located.

VI.

That pursuant to said construction contract, C. B. [79] Stratton, as original contractor, set about to effect said alterations in said factory building; that a notice of completion with respect to said alterations was filed and recorded in the office of said County Recorder on or about September 10, 1941, and that the time for laborers and materialmen to file and record claims of lien in connection therewith expired on or about October 10, 1941; that Section 1183 of the Code of Civil Procedure of the State of California provides in part as follows:

"Filing of bond. In case the surety or sureties on any bond given as in this chapter provided shall have caused said bond to be filed and recorded in the office of the county recorder of the county in which the property is situated, before the work of improvement is completed, then no action may be maintained thereon unless there shall previously have either been filed a mechanic's lien claim as in this chapter provided or unless written notice shall previously have been given to the surety on said bond before the expiration of the time prescribed in this chapter for filing a lien to enforce such claim, which notice shall state that the person giving such notice has performed labor or furnished materials, or both, or furnished appliances, teams or power, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor, materials, appliances, teams or power and the name of the person to or for whom the same was done or

furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. The filing of an action to foreclose such lien [80] shall not be a condition precedent to a recovery on said bond. If said bond has been so filed as herein last provided then any suit brought against such surety or sureties shall be filed within six months after completion of said structure or work of improvement, as 'completion' is defined in section 1187 of this code."

VII.

That within the time limited by law, the following laborers and materialmen furnishing work and supplying materials to C. B. Stratton, as said original contractor, each filed and recorded claims of lien and lodged written notices with the American Surety Company, as surety, pursuant to the provisions of Section 1183 of the California Code of Civil Procedure: Soule Steel Company, Emil Brown & Company, Harold Shugat Company, Valley Window Cleaners, and Shattuck Lumber Company.

VIII.

That thereafter and on the dates specified in the claim herein of the American Surety Company, the American Surety Company, as surety, paid in full each claim of the laborers and materialmen specified in paragraph VII hereof and in the following amounts:

Soule Steel Company	$4,767.09
Emil Brown & Company	1,498.42
Harold Shugat Company	265.78
Valley Window Cleaners	126.85
Shattuck Lumber Company	66.64
	$6,724.78

[81]

IX.

That Jack Campbell, Probert Manufacturing Company, and Tony Stevens are laborers and materialmen furnishing work and supplying materials to C. B. Stratton as said original contractor; that none of the parties specified in this paragraph ever filed or recorded a claim of lien in connection with said alterations, nor did any of them ever give any notice, either written or oral to the American Surety Company; nor did any of them ever make any demand, either written or oral, upon the American Surety Company; nor did any of them ever communicate with the American Surety Company in any way; nor did any of them ever commence any suit or action against the American Surety Company.

That with respect to the furnishing and supplying of said work and materials specified in this paragraph, said parties have filed claims herein against the estate of the above named bankrupt as follows:

Jack Campbell	$ 805.10
Probert Manufacturing Company	385.00

Tony Stevens (total claim filed $445.45)	146.01
	$1,336.11

That in addition to the above named parties who remain unpaid as specified, there are two other laborers and materialmen in connection with said alterations who remain unpaid in the sum of $259.13; that no claim has been filed herein for said sum of $259.13, or any part thereof.

X.

That there are numerous claims against the estate of the [82] above named bankrupt other than those mentioned in this stipulation.

Dated this 17 day of March, 1943.

MARTIN GENDEL and
NAT ROSIN,
By MARTIN GENDEL,
Attorneys for Trustee.
MATHES & SHEPPARD and
GORDON F. HAMPTON,
Attorneys for American Surety Company of New York.

Filed Mar. 18, 1943 at ... Min. past 11 o'clock A. M. Ernest R. Utley, Referee, Louise Rodgers, Clerk. G

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [83]

[Title of District Court and Cause.]

OPINION

Martin Gendel, Esquire, of Los Angeles, California, representing the Trustee.

Mathes & Sheppard, of Los Angeles, California, attorneys representing the American Surety Company of New York;

Gordon F. Hampton, Esquire, of Los Angeles, California, also representing American Surety Company of New York.

O'Connor, J. F. T., Judge.

This matter comes on for review from Ernest R. Utley, Esquire, Referee in Bankruptcy. Affirmed.

The principal question presented on review from the Referee in Bankrauptcy is: Can a surety, having paid certain claims under its bond given to a contractor who later is adjudged a bankrupt, participate in dividends on its allowed claim from the estate of the contractor before the creditors of the class covered by the bond are paid in full?

The answer is no.

The contractors obtained from the American Surety Company, as surety, a Laborers & Materialmen, Statutory Form of Bond for the State of California as required by the law, "to benefit of persons who perform labor or furnish [84] . . .", etc. ". . . giving to such persons right of action to recover hereon in any suit brought to foreclose

mechanic's lien, or in a separate suit brought upon this bond . . ."

Several of the creditors for whom the bond was given complied with sec. 1183 C.C.P. California, and were paid $6724.78 by the surety company, being the amount of their claims.

Three creditors, with claims amounting to $1336.-11, did not comply with the statute, did not file a mechanic's lien, or give written notice, or commence suit against the surety. They did, however, file their claims in the Bankruptcy Court.

Two other laborers and materialmen failed to comply with the statute and failed to file claims in the sum of $259.13 in the Bankruptcy Court. Judge Paul J. McCormick of this Court, in the matter of Harold C. Strotz, Bankrupt, No. 37,302-M said:

"Section 57 (d) of the Act provides that claims which have been duly proved shall be allowed upon the receipt by or upon presentation to the court. Such claims and no others are to be allowed by the referee. Bankruptcy proceedings are largely a matter of administration by the referee, and the above section especially imposes upon the referee a duty to see that an estate or the fruits of an arrangement in bankruptcy is not distributed among those who fail to prove their legal right to share therein. A referee is more than an arbitrator in matters referred to him. He has the duty to examine the proofs filed and to determine their legal sufficiency. In re Owl Drug Co., 84 F. (2d) 342, (C. C. A. 9); In re Gobel Boat Co. 190 Fed. 92; In re Noble, 15 F. Supp. 648; and when a creditor in some form

calls the attention of the court to a patently stale claim, the referee should su sponte under the provisions of sections 2 (2) and 57 (k) examine it and determine its validity and this the referee should do whether the trustee or the objecting creditor raises specific objections to the sufficiency of the proof filed or not." [85]

The surety company filed a general claim against the bankrupt estate in the sum of $6987.48. This claim was allowed as a general claim.

The Referee made an order directing the Trustee not to pay any dividends on the general claim of the American Surety Company of New York until the claims of the three unpaid creditors, amounting to $1336.11, who were in the class covered by the bond, were paid in full.

The Supreme Court of the United States, in re American Surety Co. v. Westinghouse Electric Manufacturing Co. 296, U. S. 133, 29 A. B. R. (N.S.) 655, is authority for sustaining the order of the Referee:

"A surety who has undertaken to pay the creditors of the principal, though not beyond a stated limit, may not share in the assets of the principal by reason of such payment until the debts thus partially protected have been satisfied in full"

Again, the Supreme Court of the United States said:

"A surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied."

United States v. National Surety Co. 254 U. S. 73.

Prudence Realization Corp. v. Geist, U. S. Supreme Court (1942) 62 S. Ct. 978, 48 A. B. R. (N. S.) 695.

Jenkins v National Surety Co. 277 U. S. 258.

The fact that the three creditors did not elect to comply with sec. 1183 C.C.P., but looked to the bankrupt estate to pay their claims, does not estop them from having their claims paid by the estate prior to the payment of the claim of the surety. American Surety Company of New York v. Westinghouse Electric Manufacturing Co., supra.

Collier on Bankruptcy, Volume 3, pages 284 to 296. [86] makes the following comment:

"A mere partial discharge of the principal debt by the surety, be it prior or subsequent to the date of the filing of the petition in bankruptcy, falls squarely under Sec. 57i . . . Thus if the claim originally amounted to $1,000 and the surety paid $750 thereon, the original creditor, since his obligation is not paid in full and even though he has received $750.00, may file a claim for the full $1,000 and continue to receive dividends on the entire amount of the claim until the amount of the surety's payment plus the dividends amount to 100% of the claim. . . Then only may the surety assert his right to further dividends based on that part of the original claim to which he was subrogated ($750) . . ."

"In this respect there is no difference between a surety who is secondarily liable for the full amount of the principal debt and one who limited his lia-

bility to a certain maximum (smaller than the principal debt) on which he is surety. Both have to wait until the principal creditor is fully satisfied."

At first glance this doctrine may seem harsh. True, the surety has paid out money—discharged a claim against the bankrupt—but, as a surety, he stood in the shoes of the bankrupt to the extent that he was obligated to pay these claims. The surety's obligation was supported by a consideration, and in many instances security is required in addition to the premium exacted. Toward the class of creditors covered by the bond, the bankrupt and the surety stood shoulder to shoulder. The surety is charged with knowledge of the law as declared by our Supreme Court. The decisions are clear and hold contrary to the contention of the surety.

There is an imperative duty imposed upon the Trustee and he is required to distribute the estate according to law, and therefore has an interest in the controversy. The rights of the surety under the doctrine of subrogation or an assignment by the creditors, is discussed in Meyers v. Bank of America National Trust and Savings Association, 11 Cal 2nd. 92; 60 C. J., page 749.

The order of the referee is affirmed.

Dated December 17, 1943.

J. F. T. O'CONNOR
U. S. Dist. Judge.

[Endorsed]: Filed Dec. 17, 1943. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy Clerk.

In the District Court of the United States
Southern District of California
Central Division

No. 39606—O'C

In the Matter of

CHARLES B. STRATTON dba Temple City Building Co., and Stratton Construction Co.,
Bankrupt.

ORDER AFFIRMING REFEREE re AMERICAN SURETY COMPANY OF NEW YORK

Pursuant to the petition of American Surety Company of New York a review was duly held before the undersigned Judge concerning the Order of Referee Ernest R. Utley, made on the 15th day of June, 1943, whereby the payment of dividends to the Petitioner was subordinated to the payment of certain claims, all as recited in said Order of the Referee; Points and Authorities were duly filed by counsel for the Petitioner and by counsel for the Trustee, and the matter came on for hearing before the undersigned Judge after due notice thereof, and the same was argued before this court by Mathes & Sheppard appearing by Gordon F. Hampton, Esq., as attorneys for the Petitioner, American Surety Company of New York, and by Martin Gendel, Esq., as attorney for the Trustee; and after considering the record on review and the arguments advanced by counsel, and good cause appearing therefor: [88]

It Is Hereby Ordered that the Order of the Referee dated June 15, 1943, is affirmed.

Dated this 21 day of December, 1943.

J. F. T. O'CONNOR
United States District Judge.

Judgment entered Dec. 21, 1943. Docketed Dec. 22, 1943, Book C. O. 22, Page 464. Edmund L. Smith, Clerk. By Francis E. Cross, Deputy. [89]

In the District Court of the United States
Southern District of California
Central Division

No. 39 606 O'C

In the Matter of

CHARLES B. STRATTON, doing business as TEMPLÆ CITY BUILDING CO., and STRATTON CONSTRUCTION CO.,
Bankrupt.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Appellant.

NOTICE OF APPEAL

To: The Honorable J. F. T. O'Connor, Judge of the Above Named Court, The Clerk of Said Court, Paul W. Sampsell As Trustee In Bankruptcy, and Martin Gendel and Nat Rosin, Attorneys For said Trustee:

You, And Each Of You, will please take notice, and notice is hereby given, that American Surety Company of New York, a corporation, a claimant and petitioner in the above entitled cause, hereby appeals to the Circuit Court of Appeals for Ninth Circuit from that [90] certain order, final judgment, and decree entitled "Order Affirming Referee re American Surety Company of New York" entered in this cause in Civil Order Book 22 at page 464 on December 21, 1943, and docketed on December 22, 1943.

Signed: MATHES & SHEPPARD
By GORDON F. HAMPTON
Attorneys for Appellant American Surety Company of New York, a corporation.
Address: 458 South Spring Street, Los Angeles (13) California.

[Endorsed]: Filed and mailed copy to Martin Gendel and Nat Rosin, Attys. for Trustee, Jan. 29, 1944 at 30 min. past 11 o'clock A. M. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [91]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDER

To: American Surety Co. of New York, and to Mathes & Sheppard, Esqs., its attorneys:

You, And Each Of You, Will Please Take Notice, that the Order Affirming the Referee was signed by Honorable J. F. T. O'Connor, Judge of the District Court on December 21, 1943, filed on said date and has been entered in Civil Order Book 22 at page 464 under date of December 21, 1943, and docketed on December 22, 1943.

Dated this 23rd day of December, 1943.

MARTIN GENDEL
Attorney for Trustee.

(Affidavit of Service by Mail.)

Filed Dec. 23, 1943. Ernest R. Utley, Referee. B. K., Clerk

[Endorsed]: Filed Feb 2, 1944. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy.

[91½]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That American Surety Company of New York, a corporation, as principal, and New York Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact business in the State of California, as surety, are held firmly bound unto Paul W. Sampsell as Trustee in Bankruptcy in the sum of Two Hundred Fifty ($250.00)

Dollars, lawful money of the United States of America to be paid to the said Paul W. Sampsell as Trustee in Bankruptcy, his attorney, successors or assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this 24th day of February, 1944.

Whereas, on December 21, 1943, in the above entitled cause in the District Court of the United States for the Southern [93] District of California, Central Division, an Order, Final Judgment and Decree was rendered, entitled: "Order Affirming Reference re American Surety Company of New York", and said American Surety Company of New York, a corporation, has duly filed Notice of Appeal from said Judgment;

Now, Therefore, the condition of this obligation is that if the said American Surety Company of New York, a corporation, shall prosecute its appeal with effect and pay all costs, if the appeal is dismissed, if said Order, Final Judgment and Decree is affirmed, or such costs as the Appellate Court may award if the said Order, Final Judgment and Decree is modified, then, this obligation to be void; otherwise, in full force and effect.

In Witness Whereof, the said principal has hereto caused its name and corporate seal to be affixed by its duly authorized officers, and said surety has hereto caused its name and corporate seal to be

affixed by its duly authorized officers, this 24th day of February, 1944.

AMERICAN SURETY COMPANY OF NEW YORK
By JOHN GURASH
Resident Vice President.

Attest:

LUCILE M. CHELSEY
Resident Assistant Secretary

NEW YORK CASUALTY COMPANY
By A. E. KRULL

Attest:

I. TAYLOR
Resident Assistant Secretary

Premium charged for this bond is $10.00 per annum. 428588E

I hereby approve the foregoing bond.

Dated the 24th day of Feby, 1944.

J. F. T. O'CONNOR
Judge.

State of California,
County of Los Angeles—ss:

On this 24th day of February A. D. 1944, before me, Ivy Taylor, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared John Gurash personally known to me to be the Resident Vice-President and Lucile M. Chesley, personally known to me to be the Resident

Assistant Secretary of the American Surety Company of New York, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) IVY TAYLOR

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Aug. 12, 1946.

State of California,
County of Los Angeles—ss.:

On this 24th day of February A.D. 1944, before me, Lucile M. Chesley, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. E. Krull, personally known to me to be the Resident Vice-President and I. Taylor, personally known to me to be the Resident Assistant Secretary of the New York Casualty Company, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) LUCILE M. CHESLEY

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Apr. 16, 1945.

[Endorsed]: Filed Feb. 25, 1944. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [94]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellant states that the points upon which it intends to rely on the appeal in this action are as follows:

1. The Order Affirming Referee re American Surety Company of New York is erroneous in that it is assumed therein that the three claimants represented here by the trustee are, or at any time were, creditors of the surety under the bond.

2. Said order is erroneous in that it ignores the fact that said three claimants are not and never were creditors protected by the bond of the surety. [95]

3. Said order is erroneous in that it disregards the rule that a surety is entitled to indemnity, reimbursement, and subrogation from the estate of

its bankrupt principal when such surety has paid in full and made whole all creditors to whom it is obligated as surety.

4. Said order is erroneous in that it deprives appellant of its pro rata dividend to which it is entitled as a surety who has paid in full and made whole all creditors to whom it at any time became obligated as surety or otherwise.

5. Said order is erroneous in that it orders that any dividend payable to appellant on its allowed general claim shall be first applied to the general claims of said three claimants (Jack Campbell, Probert Manufacturing Company, and Tony Stevens) until such claims have been paid in full.

6. Said order is erroneous in that it disregards the provisions of Section 1183 of the Code of Civil Procedure of the State of California under which appellant filed Bond No. 582303-K and thus accomplishes by indirection in bankruptcy that which could not be accomplished directly by any suit brought on said bond by said three claimants, or any of them.

7. Said order is erroneous in that it violates the terms of Bond No. 582303-K and thus accomplishes by indirection that which could not be accomplished directly.

8. Said order is erroneous in that it amounts to the making of a new surety contract by giving rights to [96] claimants not protected by the bond and then subjecting the surety to a retractive liability thereunder.

9. Said order is erroneous in that it orders the dividend payable on the allowed general claim of appellant to be limited to a sum less than a dividend "of an equal per centum" on an allowed claim in contravention of section 65(a) of the Bankruptcy Act.

10. Said order is erroneous in that it orders the dividends payable on each of the claims of said three claimants (Jack Campbell, Probert Manufacturing Company, and Tony Stevens) to be enlarged to a sum greater than the "equal per centum" to be paid on other general claims and thus contravenes the provisions of section 65(a) of the Bankruptcy Act.

11. Said order is erroneous in that it deprives appellant general creditor of its pro rata dividend from the general assets of the bankrupt's estate and grants to said three claimants as general creditors of the bankrupt all or part of the pro rata dividend belonging to appellant.

12. Said order is erroneous in that it orders the creation of causes of action in the hands of three non-diligent general claimants of the bankrupt against another general claimant and thus by said order a court of equity aids the non-diligent contrary to equitable principles.

13. Said order is erroneous in that it orders summary execution upon the pro rata dividend payable to [97] appellant as a general claimant against whom said three general claimants at no time had any cause of action at law or in equity or otherwise.

14. Said order is erroneous in that it gives said

three general claimants all or part of the dividends payable on appellant's claim even though said three general claimants were precluded and barred from any recovery under said Bond No. 582303-K and section 1183 of the Code of Civil Procedure of the State of California.

15. Said order is erroneous in that it orders seizure of all or part of the pro rata dividend payable to appellant, and thereby said order deprives appellant of property without due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States of America.

16. Said order is erroneous in that it deprives appellant of its contractual right to indemnity from the estate of said bankrupt by reason of the express contract of indemnity between said bankrupt and appellant, and thereby said order deprives appellant of property without due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States of America.

17. Said order is erroneous in that appellee Paul W. Sampsell, as trustee in bankruptcy, is not the real party in interest thereunder and had no standing to petition for said order for the reason that [98] the real parties in interest under said order are said three general claimants (Jack Campbell, Probert Manufacturing Company, and Tony Stevens).

18. Said order is erroneous in that it purports

to determine in bankruptcy a collateral dispute among certain general creditors of the bankrupt.

Dated February 16, 1944.

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attorneys for American Surety Company of New York, a corporation, Appellant.

[Endorsed]: Filed Feb. 25, 1944. [99]

[Title of District Court and Cause.]

STIPULATION RE DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL

It is hereby stipulated by the parties hereto, through their respective attorneys thereunto duly authorized, that the following shall constitute the transcript of record on appeal:

1. Involuntary Bankruptcy Petition Against Individual;
2. Petition for Order Referring Proceedings to a Referee Under the Provisions of Section 22a of the Bankruptcy Act;
3. Order of General Reference;
4. Order of Adjudication;
5. Subpoena to Alleged Bankrupt; [100]
6. Summary of Debts and Assets;
7. Statement of Affiairs;

8. Discharge of Bankrupt;

9. Referee's Certificate on Review;

10. Findings of Fact, Conclusions of Law, and Order re American Surety Company;

11. Petition for Review of Referee's Order by Judge;

12. Petition of Trustee for Order to Show Cause, re American Surety Company;

13. Order to Show Cause re American Surety Company of New York;

14. Claim of American Surety Company of New York, a corporation;

15. Claim of Jack Campbell;

16. Claim of Tony Stevens;

17. Claim of Probert Manufacturing Company;

18. Stipulation as to Certain Facts re Order to Show Cause re American Surety Company of New York;

19. Opinion of Judge.

20. Order Affirming Referee re American Surety Company of New York;

21. Notice of Appeal;

22. Notice of Entry of Order;

23. Statement of Points; and

24. This Stipulation. [101]

Dated this 16th day of February, 1944.

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attorneys for American Surety Company of New York, a corporation, Appellant
MARTIN GENDEL and
NAT ROSIN
By MARTIN GENDEL
Attorneys for Paul W. Sampsell, Trustee in Bankruptcy, Appellee

[Endorsed]: Filed Feb. 25, 1944. [102]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION IN CIRCUIT COURT OF APPEALS

Whereas, the appellant requires additional time for the preparation of the record on appeal, and it is desirable that the Clerk of the above named Court be given additional time for the preparation thereof; and

Whereas, the appellee desires to enter into certain correspondence with the Clerk of the Circuit Court of Appeals for the Ninth Circuit in connection with certain contemplated preliminary motions in said Circuit Court of Appeals;

It Is Hereby Stipulated between Paul W. Sampsell, trustee in bankruptcy and appellee in the above entitled cause, and American [103] Surety Company of New York, a corporation, appellant, through their respective attorneys thereunto duly authorized, that the time for filing the record on appeal and docketing the action herein in the Circuit Court of Appeals for the Ninth Circuit shall be and is hereby extended to March 31, 1944.

Dated this 6th day of March, 1944.

MARTIN GENDEL and
NAT ROSIN,
By MARTIN GENDEL
Attorneys for Paul W. Sampsell, Trustee in Bankruptcy, Appellee

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attorneys for American Surety Company of New York, a corporation, Appellant.

It is so Ordered this 6th day of March, 1944.

J. F. T. O'CONNOR
Judge

[Endorsed]: Filed Mar. 6, 1944. [104]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 104 inclusive contain full, true and correct copies of: Involuntary Bankruptcy Petition; Petition for Order Referring Proceedings to a Referee under the Provisions of Section 22a of the Bankruptcy Act; Order of General Reference; Order of Adjudication; Nunc Pro Tunc Order Correcting Decree; Subpena to Alleged Bankrupt; Summary of Debts and Assets; Statement of Affairs; Discharge of Bankrupt; Referee's Certificate on Review; Findings of Fact, Conclusions of Law and Order re American Surety Co.; Petition for Review of Referee's Order; Petition of Trustee for Order to Show Cause re American Surety Co.; Order to Show Cause re American Surety Co. of New York; Proofs of Claims of American Surety Company of New York, Jack Campbell and Tony A. Stevens, respectively; Proof of Claim of Probert Mfg. Co. Ltd.; Stipulation as to Certain Facts re Order to Show Cause re American Surety Company of New York; Opinion; Order Affirming Referee re American Surety Company of New York; Notice of Appeal; Notice of Entry of Order; Bond for Costs on Appeal; Statement of Points; Stipulation re Designation of Portions of Record to be Contained in Record on Appeal and Stipulation and Order Extending Time for Filing

Record on Appeal and Docketing Action in Circuit Court of Appeals which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $24.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29 day of March, 1944.

[Seal] EDMUND L. SMITH,
Clerk
By THEODORE HOCKE
Deputy Clerk

[Endorsed]: No. 10721. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a corporation, Appellant, vs. Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 30, 1944.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10721

In the Matter of

CHARLES B. STRATTON, doing business as TEMPLE CITY BUILDING CO., and STRATTON CONSTRUCTION CO.,

Bankrupt;

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant.

CONCISE STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION THEREOF AND TO BE PRINTED

For its concise statement of points on appeal on which the appellant intends to rely, the appellant adopts the Statement of Points filed with the Clerk of The District Court of the United States, Southern District of California, Central Division (original certified record on appeal, pp. 95-99, inclusive).

The appellant hereby designates the entire record on appeal certified by the Clerk of said District Court as necessary for the consideration of the appeal in this cause and to be printed. All filing stamps shall appear in the printed record, but the titles of the Court and the cause and the names

and addresses of attorneys appearing above the captions shall be omitted in printing.

Dated March 28th, 1944.

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attornyes for American Surety Company of New York, a Corporation, Appellant.

(Affidavit of Service by Mail.)

No. 10721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co.,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10721

AMERICAN SURETY COMPANY OF NEW YORK,

Appellant,

vs.

PAUL W. SAMPSELL, etc.,

Appellee.

MOTION TO DISMISS APPEAL

To the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Appellee, Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, and respectfully represents as follows:

I.

That on the 21st day of December, 1943, the Order Affirming the Referee in this matter was signed by Judge J. F. T. O'Connor, and the same was filed on said date and was duly entered in Civil Order Book 22, at page 464, under date of December 22, 1943, and said Order Affirming the Referee was docketed on December 23, 1943.

II.

That on the 23rd day of December, 1943, notice of entry of the Order was duly served on the Appellant herein.

III.

That on the 23rd day of December, 1943, the original order and the affidavit showing service on the appellant herein was duly filed with the Clerk of the Court by filing the same with the office of Ernest R. Utley, Referee in Bankruptcy, in charge of the within proceedings.

IV.

That the notice of appeal in the within action was filed on January 29, 1944, with the Office of the Clerk.

V.

That since the notice of appeal was filed more than thirty days after service of notice of the docketing of the order appealed from, which said notice was filed within five days from the date of service thereof, to wit, December 23, 1943, the said notice of appeal was filed beyond the authorized time and the within appeal should therefore be dismissed.

Wherefore, your appellee prays that this court make an order dismissing the appeal and allowing the costs incurred to date to the appellee.

Respectfully submitted,
MARTIN GENDEL and
NAT ROSIN,
By MARTIN GENDEL,
Attorneys for Appellee.

[Endorsed]: Filed April 24, 1944. Paul P. O'Brien, Clerk.

In the District Court of the United States, Southern District of California, Central Division

No. 39606—O'C—

In the Matter of

CHARLES R. STRATTON dba Temple City Building Co., and Stratton Construction Co., Bankrupt.

AFFIDAVIT OF H. H. SAMUELS

State of California,
County of Los Angeles—ss.

H. H. Samuels, being first duly sworn, deposes and states: That he is over the age of 21 years and for many years last past, has been the Clerk for the offices of Martin Gendel, Attorney at Law.

That on the 23rd day of December, 1943, he received an instruction in writing to file with the Clerk of the District Court the notice of Entry of Order in the above entitled case, dated December 23rd, 1943, the said order having been served on said date on the offices of Mathes & Sheppard, attorneys at law, at 458 South Spring Street, Los Angeles, California, in the manner indicated on the affidavit of services contained on the original notice of entry of Order which is a part of the record of this proceeding.

Your affiant does recall presenting the original notice of entry of order for filing with a Clerk of the District Court and actually stamping the written instructions of said Martin Gendel, with the stamp of Edmund L. Smith, as Deputy Clerk, bear-

ing the stamp of December 23rd, 1943; your affiant does not recall whether or not he left the notice of entry of order with the clerk and that thereafter whatever was done with the notice was done by the Clerk of the District Court, or whether the clerk informed him that since the order involved was an affirmation of the Referee that it should be filed with the offices of the Referee; at any rate, upon checking the file of the clerk's office, your affiant has discovered that the notice of entry of order was ultimately filed on the 23rd day of December, 1943 with the offices of the Honorable Ernest R. Utley, Referee in Bankruptcy.

Dated: this 17th day of February, 1944.

H. H. SAMUELS

Subscribed and sworn to before me this 17th day of February, 1944.

[Seal] [Illegible]

Notary Public in and for the above named County and State.

My Commission Expires June 19, 1945.

[Endorsed]: Filed April 21, 1944. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10721

AMERICAN SURETY COMPANY OF NEW YORK,

Appellant,

vs.

PAUL W. SAMPSELL, etc.,

Appellee.

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the American Surety Company of New York does hereby acknowledge receipt of a copy of the affidavit of H. H. Samuels, which affidavit is dated February 17, 1944, and that this stipulation shall constitute proof of service thereof.

Dated this 17th day of April, 1944.

MARTIN GENDEL,
Attorney for Appellee
MATHES & SHEPPARD,
By GORDON HAMPTON,
Attorneys for Appellant

[Endorsed]: Filed April 22, 1944. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy Clerk.

District Court of the United States, Southern District of California, Central Division

United States of America,
Southern District of California—ss.

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of Affidavit of H. H. Samuels and Stipulation filed April 21, 1944 and April 22, 1944 respectively in the Matter of Charles R. Stratton, etc., Bankrupt, No. 39606—O'C—In Bankruptcy, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 24th day of April, A. D. 1944.

[Seal] EDMUND L. SMITH
Clerk,
By THEODORE HOCKE
Deputy Clerk

[Endorsed]: Filed April 26, 1944. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, June 12, 1944.

Before: Garrecht, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTION TO DISMISS

Pursuant to stipulation of counsel for the respective parties, It Is Ordered that the motion of appellee to dismiss appeal be, and hereby is submitted for consideration and decision on briefs on file.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, June 13, 1944.

Before: Garrecht, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING MOTION TO DISMISS

Upon consideration thereof, and by direction of the Court, It Is Ordered that the motion of appellee to dismiss appeal, heretofore submitted be, and hereby is denied.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, March 13, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Gordon F. Hampton, counsel for appellant, and by Mr. Martin Gendel, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 24, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Mathews, Stephens and Healy, Circuit Judges.

Mathews, Circuit Judge.

OPINION

On January 2, 1941, Charles B. Stratton contracted with General Electric Company to make certain alterations in that company's factory building at Ontario, California. On January 3, 1941, Stratton and appellant, American Surety Company of New York, executed a bond reading as follows:

"Know All Men by These Presents: That We, C. B. Stratton, doing business as the Stratton Construction Company as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transaction business under the laws of the State of California, as Surety, are held and firmly bound unto any and all persons, furnishing materials used in, upon, for or about the performance of the work contracted to be executed or performed under the contract hereinafter mentioned, and all persons who performed work or labor upon the same, and all persons who supply both work and materials, and whose claim has not been paid by the contractor, company, or corporation, in the just and full sum of Thirty-

Three Thousand Nine Hundred Fifty and No/100 ($33,950.00) Dollars, for the payment whereof well and truly to be made, said Principal and Surety bind themselves, their heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

"The Condition of the Foregoing Obligation Is Such, That Whereas the above bounden Principal has entered into contract, dated January 2, 1941, with General Electric Company to do and perform the following work, to-wit: doing all alterations to factory building for the General Electric Company, Ontario, California,

"Now, Therefore, if the above bounden Principal shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work described in said contract or in any modification thereof, then this obligation shall be void; otherwise to remain in full force and effect. This bond shall inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in said work, giving to such persons a right of action to recover hereon in any suit brought to foreclose mechanics liens arising under said contract or in a separate suit brought upon this bond in an amount not exceeding, however, in the aggregate of all recoveries, the amount of the bond as above specified.

"No suit or action on this bond to recover for labor performed or material furnished in respect to work herein referred to shall be sustained unless the same be commenced within the period provided by law after the claimant filed his claim of lien, or

if he files no such claim of lien, unless the suit or action be commenced within six months after the contractor finally ceases operations on the work described in said contract."

The work described in the contract was completed on or about September 10, 1941. Stratton did not pay or cause to be paid the claims of all persons performing labor upon or furnishing materials used in doing the work described in the contract. Five such claims, aggregating $6,724.78, were not paid by Stratton, but were paid by appellant. Three such claims, aggregating $1,336.11, were not paid at all. The three unpaid claims were those of Jack Campbell, Probert Manufacturing Company, hereafter called Probert, and Tony Stevens, for $805.10, $385 and $146.01, respectively.

On November 27, 1941, Stratton was adjudged a bankrupt. Appellee, Paul W. Sampsell, was appointed trustee. Appellant filed with the referee in bankruptcy proof of a claim for $6,987.48, asserting that it had executed the above mentioned bond as Stratton's surety upon his application and agreement to indemnify and save appellant harmless against all claims and expenses resulting therefrom, and that, as such surety, it had paid five claims, aggregating $6,724.78, as stated above, plus expenses amounting to $262.70—a total of $6,987.48. Appellant's claim was allowed. Campbell, Probert and Stevens filed with the referee proofs of their claims, aggregating $1,336.11. These were allowed, as were the claims of numerous other creditors.

Appellee, as trustee, petitioned for and obtained

from the referee an order directing that no dividend be paid on appellant's claim unless and until the claims of Campbell, Probert and Stevens were paid in full; that "such amount of the dividend otherwise payable on the claim of [appellant] as may be required when divided prorata amongst the named three creditors, shall be applied on their claims, in addition to their ordinary dividend until their claims have been paid in full or the dividends otherwise payable to [appellant] have been exhausted;" and that, "after the said three creditors have been paid in full, then the balance remaining of the dividend otherwise payable to [appellant], if any, shall be paid to [appellant]." From a judgment[1] affirming the referee's order this appeal is prosecuted.

The order was correct; for, having obligated itself, as Stratton's surety, to pay the claims of all persons performing labor upon or furnishing materials used in doing the work described in the contract, having paid the claims of five and having failed to pay the claims of three such persons (Campbell, Probert and Stevens), appellant was not entitled to share in the assets of Stratton's bankrupt estate until the claims of Campbell, Probert and Stevens were paid in full.[2]

In its brief filed here, appellant states that it

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[1] In re Stratton, D.C.S.D.Cal., 53 F. Supp. 131.

[2] United States v. National Surety Co., 254 U.S. 73; Jenkins v. National Surety Co., 277 U.S. 258; American Surety Co. v. Westinghouse Electric Mfg. Co., 296 U.S. 133; Prudence Realization Corp. v. Geist, 316 U.S. 89.

"has paid in full all the bankrupt's creditors whose claims are covered by the bond." The statement is incorrect. The claims of Campbell, Probert and Stevens are covered by the bond and have not been paid.

Appellant cites the fourth paragraph of the bond, limiting the time within which actions might be brought thereon, and cites § 1183 of the California Code of Civil Procedure, limiting the time within which actions may be brought on bonds provided for in that section. These limitations have no relevancy here, for this is not an action on a bond, but is a bankruptcy proceeding. In this proceeding, the bankruptcy court was required to, and did, determine the relative rights of creditors—Campbell, Probert, Stevens, appellant and others—in the distribution of the bankrupt's estate. That determination was governed by Federal law, not State law.[3] We therefore have no occasion to consider the State court decisions[4] cited by appellant.

Judgment affirmed.

[Endorsed]: Opinion. Filed Apr. 24, 1945. Paul P. O'Brien, Clerk.

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[3] Prudence Realization Corp. v. Geist, Supra.

[4] Kleinclaus v. Dutard, 147 Cal. 245; A. L. Young Machinery Co. v. Cupps, 213 Cal. 210; Republic Iron & Steel Co. v. Patillo, 19 Cal. App. 316; Smith v. McKnight, 117 Cal. App. 427; Carpenter v. National Surety Co., 25 Cal. App. 2d 90.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10721

AMERICAN SURETY COMPANY OF NEW YORK,

Appellant,

vs.

PAUL W. SAMPSELL, as Trustee, etc.,

Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellant.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered April 24, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred thirty-one (131) pages, numbered from and including 1 to and including 131, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of May, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.